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No. 10-97

In the Supreme Court of the United States

PATRICK J. LYNCH and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

v.

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, and POLICE COMMISSIONER RAYMOND W. KELLY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602 (1989), the Court upheld government regulations mandating suspicionless post-accident breathalyzer, blood and urine testing of railroad employees. The Court found that "'special needs,' beyond the normal need for law enforcement" (*id.* at 619)—to prevent and investigate the causes of mass accidents—exempted the privately conducted searches from the usual Fourth Amendment requirement of individualized suspicion. The Court, however, explicitly "le[ft] for another day the question whether routine use in criminal prosecutions of [the] evidence obtained * * * would * * * impugn the administrative [non-law-enforcement] nature of the * * * program" and thereby preclude departure from the requirement of individualized suspicion as a predicate to a search. *Id.* at 621 n.5. This case presents precisely that question, in the context of a program of suspicionless breath testing of New York City police officers following another sort of public safety incident—shootings.

The following question is presented:

Whether the "special needs" doctrine allows police investigators to perform suspicionless, nonconsensual, warrantless breath tests on officers involved in shootings notwithstanding that one of the purposes of the tests is to gather evidence for possible criminal prosecutions.

RULE 29.6 STATEMENT

Petitioner Patrolmen's Benevolent Association of the City of New York, Inc. has no parent corporation, and no publicly held corporation owns more than ten percent of its membership.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Patrick J. Lynch and the Patrolmen's Benevolent Association of the City of New York, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 589 F.3d 94. The decision of the district court (App. B, *infra*, 20a-33a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered December 11, 2009. A timely petition for rehearing was denied on February 17, 2010, and a corrected order issued February 25, 2010. App. C, *infra*, 34a-35a. On May 3, 2010, Justice Ginsburg extended the time to petition for a writ of certiorari to July 16, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Police Department operating procedure at issue here (IO-52) is set forth in Appendix D, *infra*, 36a-43a.

INTRODUCTION

In 2007, the New York City Police Department ("NYPD") issued a new order requiring that, as part of its investigation of shootings by police officers that result in injury or death, the NYPD's Internal Affairs Bureau ("IAB") subject the officers to suspicionless breathalyzer testing. App., *infra*, 36a-43a. The decision below upholding that order conflicts with this Court's decision in *Ferguson* v. *City of Charleston*, 532 U.S. 67, 83 n.20 (2001), where the Court held that "extensive entanglement of law enforcement" in a supposedly administrative search whose fruits will be evaluated for possible use in criminal prosecutions "cannot be justified by reference to legitimate needs." The decision also is at odds with the decisions of numerous state supreme courts that have interpreted the Fourth Amendment to invalidate state statutes that similarly mandate nonconsensual, suspicionless breath or blood testing of drivers involved in accidents resulting in injury or death where, as here, the evidence is gathered by police investigators and may be used in criminal prosecutions.

The issue is important. The decision below calls into question what has long been understood to be a minimum protection of the Fourth Amendment: the requirement that police have at least some ground for individualized suspicion before subjecting individuals whom they are investigating for potentially criminal misconduct to bodily searches. The case also raises the question of the degree of constitutional protection retained by the broad category of workers and individuals whose conduct affects public safety—

such as police and corrections officers, mass transit workers, and drivers—in the context of police investigations of public safety incidents for which these persons may bear criminal responsibility. More immediately, if uncorrected, the decision below will authorize the NYPD to continue to subject dozens of officers each year to nonconsensual searches in the course of police investigations in which, though the officers' conduct is being specifically scrutinized for evidence of crimes as serious as murder, they are deprived of the minimum protections of the Fourth Amendment.

STATEMENT

A. The Genesis of IO-52.

In 2007, following a shooting by undercover police in New York City, "there were rumors that * * * one or more officers were under the influence of alcohol at the time of the shooting."[1] See Defs.' Mem. of Law in Supp. of Defs.' Mot. to Dismiss, at 23; see also Court of Appeals Appendix ("CA App.") 72 ¶¶47-53. The Police Commissioner appointed a commission, chaired by the Chief of the Internal Affairs Bureau of the NYPD, to review procedures for undercover operations. CA App. 73 ¶¶50-51. The committee made numerous recommendations, including that the Commissioner order "mandatory breathalyzer tests of all NYPD officers, on duty and off duty, whose firearm discharge results in injury or death." *Id.* ¶52. After publicizing the recommendations, the Police Commissioner entered Interim Order 52, entitled "Alcohol Testing for Uniformed Members of the Ser-

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[1] The record is devoid of evidence suggesting any factual basis for the rumors. See *infra*, p. 7.

vice Involved in Firearms Discharges Resulting in Injury To or Death of a Person" (hereinafter "IO-52") (App., *infra*, 36a-43a). See CA App. 73-74.

B. IO-52 and Its Role in the NYPD's "Investigation into a Potential Crime."

IO-52 confers primary responsibility for the nonconsensual breath testing of officers who have wounded or killed someone to the Internal Affairs Bureau (see App., *infra*, 36a-39a), the section of the NYPD specifically "charged with * * * investigating * * * criminality and serious misconduct among NYPD officers" (CA App. 63). IO-52 mandates that, after the "Internal Affairs Duty Captain, Internal Affairs personnel and the Patrol Services Bureau Duty Inspector and Duty Captain" are alerted that a shooting has occurred, the Duty Captain or Inspector must detain "involved member(s) of the service * * * on the scene when feasible and consistent with safety (i.e., hospitalization not immediately required); pending arrival of Internal Affairs Bureau personnel assigned to administer alcohol test." App., *infra*, 37a. When the IAB Duty Captain arrives, he "[c]onduct[s the] alcohol test, using a PBT (portable breathalyzer test)." *Id.* at 38a. "If the reading on the PBT device is less than .08, no further testing is required * * *." *Ibid.* "If the reading on the PBT device is .08 or greater," the officer will be taken to the IAB testing facility for Intoxilyzer testing. IO-52 requires that "[t]he entire Intoxilyzer testing process, including the reading of the test results, will be videotaped" and the evidence carefully preserved "to safeguard the tape for evidentiary purposes." *Id.* at 39a-40a (emphasis omitted). IO-52 includes no option for an officer to refuse the suspicionless breath test, transportation

to the Internal Affairs Bureau facility, or Intoxilyzer testing. See generally App., *infra*, 36a-43a.

IO-52 is overlaid on (CA App. 74 ¶57), and specifically mandates compliance with (App., *infra*, 36a ¶2, 39a), pre-existing orders governing investigations of "Firearms Discharge by Uniformed Members of the Service" (CA App. 68-72, 96-107). Those orders set forth the extensive procedures the NYPD follows for investigating any shooting by an officer including special procedures for incidents that result in serious injury or death. See *id.* at 68-72. Under these orders, all firearms discharges by NYPD Officers "are treated as part of a possible criminal investigation." *Id.* at 69 ¶33. This is "in recognition of the fact that criminal charges may result against the NYPD officer or a civilian involved." *Ibid.* The NYPD treats the scene of every shooting, at which IO-52 mandates breath-testing of officers, "as a crime scene to ensure prosecutions." *Id.* at 72 ¶45. The investigation of a shooting by a police officer includes extensive interviews of the officers, involved persons, and witnesses, and gathering of physical evidence. See generally *id.* at 69-72, 96-107. Depending on the results of the investigation, including the breath tests for alcohol, the City may take "[a]ppropriate action" against the tested officers, which may include employment actions such as dismissal, prosecution of the officer in "a criminal case," or both. *Id.* at 72 ¶46.

C. Pre-Existing Regulations Ensuring Officers' Fitness for Duty.

Prior to issuance of IO-52, numerous regulations designed to ensure that officers were fit and sober for duty were already in place. They mandated that police superiors, trained to identify signs of intoxication and drug use, observe and assess officers' fitness for

duty and immediately detain and investigate an officer who appears intoxicated. See CA App. 94-95. Officers are also subjected to drug testing upon entering NYPD service, applying for certain assignments, and when the NYPD has reasonable ground for suspecting drug use. *Id.* at 66. All officers are also subjected to random suspicionless drug-testing. *Ibid.* Pre-existing orders mandated a range of employment actions and punishments for on-duty or excessive off-duty intoxication including dismissal probations, counseling, and terminations. See *id.* at 65, 79, 94-95. Pre-existing orders also mandated extensive procedures for investigating every shooting and ensuring that officers who discharged their weapons while intoxicated or otherwise unfit for duty were detected, their firearms removed, and appropriate actions taken. See *id.* at 94-107.

IO-52 differs from these pre-existing regulations ensuring officer fitness for duty and the integrity of police shootings in this significant respect: IO-52 is the only order to subject officers to suspicionless, nonconsensual searches as part of an investigation into specific, possibly criminal conduct, where the NYPD intends to use the results for criminal prosecutions where appropriate. See CA App. 69-70 ¶33, 72 ¶¶45-46. By contrast, other orders mandating searches of officers either specifically assure that "[p]ositive test samples" from suspicionless searches "will remain confidential" except as necessary to take noncriminal employment actions such as "Department [D]isciplinary Charges and Specifications" (*id.* at 91); or require reasonable suspicion as a predicate to the search (see, *e.g.*, *id.* at 86).

D. The Stated Purpose of IO-52 and the Special Non-Law-Enforcement Related Needs Invoked to Justify It.

IO-52 states its purpose, in its entirety, as:

> To ensure the highest levels of integrity at the scene of police involved firearms discharges which result in injury to or death of a person, on or off duty, within New York City.

App., *infra*, 36a.

The City readily concedes that the record is devoid of any evidence that the specific problem that the new suspicionless breath testing is designed to detect—an intoxicated officer shooting his weapon and unjustifiably injuring or killing another person—is a real threat or indeed has ever occurred. See App., *infra*, 45a-46a (Transcript of Argument Before Court of Appeals). No record evidence suggests that the rumor that gave rise to IO-52 had any basis in fact. See *ibid.*

In support of its contention that it has a special, non-law-enforcement need for suspicionless, nonconsensual breath testing of officers who have injured someone through discharge of their weapons, the City instead averred: *First*, over a three-year period, 38 of the total of 35,000 uniformed NYPD officers (CA App. 64 ¶3)—approximately one-tenth of one percent—had some degree of alcohol impairment while driving off-duty. *Id.* at 67 ¶21. *Second*, over a three-year period, the counseling unit that evaluates NYPD personnel to identify or address possible alcohol issues conducted approximately 600 interviews, about two-thirds of which were first interviews. *Id.* at 61-62. *Third*, over a three-year period, four offic-

ers committed suicide and had some alcohol in their blood or were physically near alcohol. *Id.* at 67 ¶22.

E. Proceedings and Opinions Below.

This action was commenced in United States District Court for the Southern District of New York in October 2007, shortly after IO-52 became effective, seeking a declaratory judgment and injunctive relief precluding enforcement of IO-52. Petitioners sought a preliminary injunction, alleging that the mandatory testing violates the Fourth Amendment's requirement of individualized suspicion as a predicate to a bodily search. The City moved to dismiss or in the alternative, for summary judgment, contending that the alcohol-testing is constitutional under the "special needs" doctrine. In a decision and order dated September 30, 2008, the court denied all three motions.

Addressing the motion for preliminary injunction, the district court explained: "Defendants contend that a sober police force serves to further" the City's "substantial interest in the safety of its citizens, visitors, and the police department," and "IO 52 encourages sobriety." App., *infra*, 31a. This "special need," the court found, was unrelated to law-enforcement. *Ibid.* Although the court recognized that the testing was also partly "concerned with law enforcement goals" (*id.* at 30a), it found that "generat[ing] evidence for prosecution" could not be the ***primary*** purpose because thus far none of the tested officers had "even found to be intoxicated" and hence none had been prosecuted (*id.* at 31a).

On appeal, the Second Circuit upheld the denial of the preliminary injunction. App., *infra*, 1a-19a. Although noting that IO-52 states its only purpose as

"'[t]o ensure the highest levels of integrity at the scene of police involved firearms discharges'" (*id.* at 10a n.2), the court found that the record indicated that the policy of mandatory suspicionless breath testing served four distinct purposes: (1) to ensure "that an officer who fires his or her gun while intoxicated * * * can be quickly disciplined or removed from duty" (*id.* at 11a); (2) to deter intoxicated shootings (*ibid.*); (3) to "promot[e] the NYPD's reputation among New York City residents" (*id.* at 12a); and (4) to gather "evidence in a criminal investigation of the officer who [is] tested" (*ibid.*). The court deemed the first three to be "special needs" unrelated to law enforcement and the fourth to be self-evidently "directly related to crime control." *Id.* at 12a-13a.

Citing this Court's decisions in several automobile checkpoint cases, the court of appeals held that where, as here, a policy of suspicionless testing has multiple purposes, only one of which is to gather "evidence in a criminal investigation of the [individual] who [is] tested," the "primary" purpose controls. See App., *infra*, 12a-14a. The court of appeals then—in one sentence without analysis—upheld the trial court's conclusion that plaintiffs had failed to disprove the City's contention that law enforcement was not the primary purpose. *Id.* at 14a. As noted, this conclusion relied on the rationale that no tested officers had been prosecuted because none had been intoxicated. *Id.* at 31a.

Although the court of appeals cursorily cited this Court's decision in *Ferguson* v. *City of Charleston*, 532 U.S. 67, 83-84 (2001) (App., *infra*, 8a), it disregarded the Court's key holdings. Specifically, it failed to note that *Ferguson* rejected a claim of "special needs" for suspicionless drug-testing because of the

"fact that positive test results were turned over to the police" (532 U.S. at 84) and because "extensive entanglement of law enforcement" in suspicionless bodily searches "cannot be justified by reference to [special] needs" (*id.* at 83 n.20). Finally, the court of appeals failed to acknowledge that both *Ferguson* and the checkpoint cases themselves expressly "distinguished the cases dealing with checkpoints from those dealing with 'special needs.'" *Id.* at 83 n.21.

F. All Parties to the Appeal Agree that the Present Record Is Sufficiently Complete To Allow Final Decision on the Constitutionality of IO-52.

At oral argument in the court of appeals, counsel for all parties to the appeal agreed unequivocally that, although the appeal was from the denial of a preliminary injunction, the existing record is sufficiently developed to allow a final determination of the constitutionality of IO-52.[2] Petitioners represent

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[2] The court of appeals inquired whether "we are in a position on the basis of this record to rule that the breathalyzer policy is reasonable under the * * * Special Needs Doctrine or is the record not yet fully developed for * * * any court to * * * make that kind of assessment?" Counsel for respondents answered: "[W]e obviously believe that the record was sufficient to make that determination." App., *infra*, 47a. The court inquired whether "there's enough of an evidentiary record to support that legal determination?" Counsel for respondents again answered: "Absolutely." *Ibid.* The court summarized: "So, you and [counsel for plaintiffs] agree that the evidentiary record is as complete as it's likely to get?" *Id.* at 49a. Respondents' counsel confirmed: "[C]ertainly as complete as it's probably gonna get from my point of view." *Ibid.* Counsel for petitioners concurred. *Id.* at 49a-50a.

that if the Court grants review and affirms, petitioners will dismiss their complaint.

REASONS FOR GRANTING THE PETITION

I. This Case Well Presents An Issue Reserved In *Skinner* v. *Railway Labor Executives' Association*: Whether The Fourth Amendment Permits Nonconsensual, Suspicionless Substance Testing Designed In Part To Gather Evidence For Possible Use In A Criminal Prosecution.

"To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler* v. *Miller*, 520 U.S. 305, 313 (1997). This is particularly true "[i]n most criminal cases," where the Court generally finds "in favor of the procedures described by the Warrant Clause of the Fourth Amendment." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

In *Skinner*, the Court nonetheless upheld government regulations mandating suspicionless, warrantless breathalyzer, blood and urine testing by private railroads of their employees in investigations of serious public safety incidents. The Court confirmed that "[s]ubjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis, * * * implicates * * * concerns about bodily integrity" similar to those implicated by blood testing and is therefore a "search" within the meaning of the Fourth Amendment. *Skinner*, 489 U.S. at 616-617 (citing *Schmerber* v. *California*, 384 U.S. 757, 767-768 (1966)). The Court found, however, that the tests were mandated by the government, "not to assist in

the prosecution of employees, but rather to prevent accidents and casualties in railroad operations." *Id.* at 620-621 (internal quotation marks omitted)).

The Court held that these "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Skinner*, 489 U.S. at 619 (internal quotation marks omitted). The Court emphasized that the searches were conducted not by law-enforcement officials, but rather by private "[r]ailroad supervisors" who "are not in the business of investigating violations of the criminal laws" and therefore "have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence." *Id.* at 623. Imposing upon them a requirement of adducing individualized grounds for suspicion as a predicate to a search therefore would be impractical. See *ibid.* In so ruling, however, the Court explicitly reserved "for another day" the question whether such suspicionless, warrantless testing of individuals in the investigation of public safety incidents would be constitutional if test results were intended for use, or were routinely used, in criminal prosecutions of the tested individuals. *Id.* at 621 n.5.

Since *Skinner*, the Court has explicitly predicated its decisions upholding suspicionless searches by reference to "special needs" on the fact that the results of the searches at issue were not to be used in criminal prosecutions. As Justice Kennedy observed in *Ferguson*: "The traditional warrant and probable-cause requirements are waived in our previous [special needs] cases ***on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes.***" 532 U.S. at 88 (Kennedy, J., concurring) (empha-

sis added). In *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), for example, decided with *Skinner*, the Court found a "special need" for suspicionless drug testing of customs service employees because "[t]est results may not be used in a criminal prosecution of the employee without the employee's consent," making it "clear that the * * * drug-testing program is not designed to serve the ordinary needs of law enforcement." *Id.* at 666. The Court similarly emphasized the lack of law-enforcement involvement and non-use of test results for criminal prosecutions in its decisions allowing certain suspicionless drug testing in schools. See, *e.g.*, *Board of Educ.* v. *Earls*, 536 U.S. 822, 833 (2002) (emphasizing that "the test results are not turned over to any law enforcement authority"); *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 658 (1995) (emphasizing that "the results of the tests * * * are not turned over to law enforcement authorities or used for any internal disciplinary function").

In *Ferguson*—the only "special needs" case since *Skinner* in which the Court confronted a regime of suspicionless, nonconsensual drug or alcohol testing of free persons, the results of which would routinely be considered for use in criminal prosecutions—the Court held the searches unconstitutional. See *infra*, Part II. The Court found: "The fact that positive test results were turned over to the police does not merely provide a basis for distinguishing our prior cases applying the 'special needs' balancing approach to the determination of drug use. It also provides an affirmative reason for enforcing the strictures of the Fourth Amendment." *Ferguson*, 532 U.S. at 84. The Court also found highly significant that, "throughout the development and application of the [drug testing]," "police were extensively involved." *Id.* at 82.

The court concluded that, regardless of any benevolent ultimate purpose, such ***extensive "entanglement of law enforcement cannot be justified by reference to legitimate needs***." *Id.* at 83 n.20 (emphasis added).

This case cleanly presents precisely the question reserved by the Court in *Skinner*, not presented in subsequent "special needs" cases where the search policies carefully cabined test results from law-enforcement officials, and then addressed by the Court in a different context in *Ferguson*. Unlike in *Skinner*, where "respondents aver[red] generally that test results might be made available to law enforcement authorities" but cited no evidence to support that claim (489 U.S. at 621 n.5), there is no doubt here that "test results might be made available to law enforcement authorities," as they are gathered by law-enforcement authorities in the first instance. Indeed, the results are gathered in particular by the Police Department's IAB—the bureau "charged with * * * investigating possible * * * criminality * * * among NYPD officers." CA App. 63 ¶2.

Further, the Police Department readily acknowledges that it administers the nonconsensual breath tests to officers as part of its "investigation into a possibly criminal matter" (CA App. 70 ¶33)—a police shooting that has wounded or killed someone—and it agrees that the test results may be used in a "criminal case" and "prosecution" of the tested officers, involved civilians, or both (*id.* at 69 ¶33, 72 ¶¶45-46, 76 ¶66). Accordingly, both lower courts found, and it is beyond reasonable dispute, that one of the City's purposes in testing officers, whether or not the primary purpose, is to investigate them for a possibly serious crime of unjustifiably wounding or killing a

civilian and to gather evidence with which it might criminally prosecute them. See App., *infra*, 12a, 30a-31a.

The procedural posture of this petition for certiorari—arising on appeal from a denial of a preliminary injunction of the policy—poses no impediment to the Court's review. The parties to the appeal concurred below that the record is complete and sufficient for a final determination of the constitutionality of the testing policy, IO-52. See *supra*, pp. 10-11 & n.2. The Court has previously granted certiorari in similar circumstances, to address the constitutionality of a City's policy of suspicionless checkpoint stops, likewise arising from an appeal following a motion for preliminary injunction. See *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000).

II. The Second Circuit's Decision Is In Sharp Tension With This Court's Decision In *Ferguson* v. *City of Charleston*.

A. *Ferguson* Makes Clear that "Excessive Entanglement of Law Enforcement" and Police Evaluation of Positive Test Results for Use in Criminal Prosecutions Invalidate Suspicionless Searches.

A decade after *Skinner*, the Court decided *Ferguson* v. *Charleston*, 532 U.S. 67, which, although arising in a somewhat different context, left little doubt as to how the question left open in *Skinner* would be answered. The ruling below in this case cannot be reconciled with *Ferguson*.

In *Ferguson*, the Court found unconstitutional a program of nonconsensual, suspicionless drug testing of pregnant women where the ultimate objective—to protect the tested women and their fetuses from

harm from illegal drug use—was to be achieved via threatened or actual criminal prosecution of women who tested positive. Despite the highly "beneficent" purpose of this program, the Court rejected application of the "special needs" doctrine to such a situation. *Ferguson*, 532 U.S. at 81. Although the majority and Justice Kennedy in concurrence disagreed about whether the "primary purpose" of the searches was a "special need" to protect maternal and fetal health, or instead a law-enforcement objective to investigate and gather evidence of a possible crime, this was not the dispositive consideration. As the majority explained: "***Our essential point is the same as Justice Kennedy's—the extensive entanglement of law enforcement cannot be justified by reference to legitimate needs***." *Id.* at 83 n.20 (emphasis added). Justice Kennedy concurred: notwithstanding that "the policy may well have served legitimate needs unrelated to law enforcement, it had as well a penal character with a far greater connection to law enforcement than other searches sustained under our special needs rationale" and was therefore unconstitutional. *Id.* at 88-89 (Kennedy, J., concurring).

So too here. Whatever the ostensible legitimate civil purposes served by the policy, law enforcement is not merely "entangled" with IO-52, it is a law-enforcement policy in every sense from inception through implementation. The idea for the policy was conceived by a committee chaired by the chief of the IAB, the arm of the Police Department charged with investigating crimes by police officers, and will be implemented by that bureau. As noted, the breath-testing is conducted as part of what the NYPD itself characterizes as an "investigation into a possibly criminal matter" (CA App. 70 ¶33) to assess criminal liability and gather evidence that may be used for a

possible "criminal case" and "prosecution" of the tested officer for unlawfully killing or wounding another person (*id.* at 72 ¶¶45-46, 76 ¶66).

As in *Ferguson*, "[t]he stark and unique fact that characterizes this case" is that the policy at issue was in part "designed to obtain evidence of criminal conduct by the tested [persons]" that would be evaluated by "police and that could be admissible in subsequent criminal prosecutions." 532 U.S. at 85-86. As the Court concluded in *Ferguson*, "[t]he Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to such a policy." *Id.* at 86.

The Court also observed in *Ferguson* that, "[i]n other special needs cases," it had "tolerated suspension of the Fourth Amendment's warrant or probable-cause requirement in part because there was ***no*** law enforcement purpose behind the searches." 532 U.S. at 79 n.15 (emphasis added) (citing *Skinner*, 489 U.S. at 620-621; *Von Raab*, 489 U.S. at 665-666; *Acton*, 515 U.S. at 658). By contrast, as noted above, it is not fairly disputable that one of the purposes of IO-52, whether or not the primary purpose, is law-enforcement. See App., *infra*, 12a-13a, 32a.

Disregarding *Ferguson*, however, the court of appeals invoked this Court's checkpoint cases for the proposition that special civil objectives can justify suspicionless seizures by law-enforcement officials who are, in part, looking for evidence of possibly criminal conduct. See App., *infra*, 13a-14a (citing *Edmond*, 531 U.S. at 37-39; *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444 (1990) (need to reduce the hazard posed by drunk drivers justified drunk-driving checkpoint), and *United States* v. *Martinez-*

Fuerte, 428 U.S. 543 (1976) (need to intercept illegal aliens justified checkpoint near border).

The court of appeals failed to note, however, that in *Ferguson*, the Court expressly distinguished the temporary seizures involved in the checkpoint cases from bodily searches like those required by IO-52. See 532 U.S. at 83 n.21 (distinguishing *Edmond*, *Sitz*, and *Martinez-Fuerte*). The Court explained: "First, those cases involved roadblock ***seizures***" entailing only a brief stop "rather than 'the intrusive search of the body or the home.'" *Ibid.* (emphasis added). "Second, the Court [has] explicitly distinguished the cases dealing with checkpoints from those dealing with 'special needs.'" *Ibid.* In short, the checkpoint cases cannot support the lawfulness of IO-52.

B. Applying *Ferguson*'s Definition of "Primary Purpose," IO-52 Has Ordinary Law Enforcement Purposes, and the "Special Needs" Exception Therefore Does Not Apply.

In addition to making the "essential point" in *Ferguson* that "the extensive entanglement of law enforcement" in suspicionless substance testing "cannot be justified by reference to legitimate needs" (532 U.S. at 83 n.20), the majority found that law enforcement was the "primary purpose" of the suspicionless drug-testing program at issue. The Court reasoned that, although "the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for *law enforcement purposes* in order to reach that goal." *Id.* at 82-83 (emphasis in

original). The majority held that the "immediate objective" determines the "primary purpose." See *ibid.*

The courts below erred in disregarding *Ferguson*'s focus on "immediate objective" in identifying which of the NYPD's multiple asserted purposes for its program of suspicionless searches was "primary." As in *Ferguson*, however legitimate the stated ultimate objectives, "the ***immediate*** objective of the searches [is] to generate evidence *for law enforcement purposes*." 532 U.S. at 83 (first emphasis added).

IO-52 describes its purpose, in its entirety, as being to "ensure the highest levels of integrity at the scene of police involved firearms discharges which result in injury to or death of a person." App., *infra*, 36a. That sentence bears two interpretations. The first, and most apparent, is: a purpose to ensure the "highest levels of integrity" in the investigation of the crime "scene," that is, to ensure that the very best evidence of innocence or guilt is obtained. The second, urged by the NYPD (CA App. 76 ¶69), is: a purpose to ensure that the officers have acted or are perceived by the public as having acted with integrity in discharging their weapons.

The first purpose—to ensure the "integrity" of the investigation by enabling police to obtain the very best evidence of innocence or guilt—is self-evidently and quintessentially a law enforcement objective, and the lower courts so found. See App., *infra*, 12a. The police always would like to obtain the very best evidence of innocence or guilt, but that is not a civil need. Indeed, the Fourth Amendment was written precisely to protect against the intrusions on the privacy of citizens that would be wrought by law

enforcement officials' unrestrained pursuit of the very best evidence of innocence or guilt.

The second objective—to ensure that the officers are perceived by the public as having acted with integrity—though a legitimate civil objective, is also, just like the legitimate civil objective of protecting maternal and fetal health in *Ferguson*, entirely derivative of a more immediate law-enforcement objective: to acquire the best evidence of innocence or guilt. A negative breathalyzer can reinforce the NYPD's perceived integrity, if at all, only by reassuring the public that the best evidence of innocence of intoxicated shooting has been obtained. A positive breathalyzer can reinforce the NYPD's integrity, if at all, only by reassuring the public that the best evidence of guilt has been obtained and can be used to prosecute the guilty officer to the fullest extent of the law. The "immediate objective" of the suspicionless breathalyzer is thus a law-enforcement objective of obtaining the best evidence of innocence or guilt, and it is only by so doing that the invoked "ultimate" objective of reassuring the public of the integrity of the NYPD following a shooting can be accomplished.

Although IO-52 suggests no other purposes, the Chief of the IAB stated in an affidavit, and the court of appeals accordingly found (see App., *infra*, 10a-11a & n.2), that the policy serves two additional purposes (see *id.* at 11a): (1) "protecting the safety of the public and NYPD officers" by enabling the NYPD to immediately remove from further duty any intoxicated officers and (2) "deterring alcohol intoxication by NYPD officers who are carrying firearms" (CA App. 77 ¶15).

However, prior to adoption of IO-52, the NYPD already maintained extensive regimes for monitoring

the sobriety and fitness for duty of officers and immediately investigating, confiscating the weapon of, removing from duty, and/or punishing any officer who is intoxicated. See *supra,* pp. 5-6. IO-52 added only one thing to those regimes of protection and deterrence: the ability to test officers ***after*** they have caused serious injury or death without any ground for suspicion, and with the power to use positive tests to prosecute. See *ibid.*

As the Mississippi Supreme Court observed in holding unconstitutional a state statute that similarly mandated suspicionless post-incident testing whose results could be used in criminal prosecutions, such testing—occurring, as it does, only ***after*** a serious safety incident occurs—comes too late to "protect[] the safety of the public" and "deter[]" the dangerous conduct. "Although the State undoubtedly has a significant interest in preventing accidents involving alcohol and drugs * * * [post-incident testing] * * * does nothing to further that interest. [It] is not applicable prior to the occurrence of a serious accident; therefore, it is prosecutorial, not preventive in nature." *McDuff* v. *Mississippi*, 763 So. 2d 850, 855 (Miss. 2000) (en banc) (citation omitted). The same is true here.

C. The Court Should Grant Review Even if It Agrees with the Lower Courts that the *Primary* Purposes of IO-52 Are Legitimate Civil Objectives Unrelated to Law Enforcement.

Because the majority in *Ferguson* found that the "primary purpose" of the program of drug-testing at issue there was law enforcement, it arguably remains an open question whether, as Justice Kennedy appears to have believed, "extensive entanglement of

law enforcement" and the "fact that positive test results [are] turned over to the police" would doom a program of suspicionless searches even if law enforcement were not the "primary purpose." 532 U.S. at 83-84 & n.20; see *id.* at 86-89 (Kennedy, J., concurring) (disagreeing with the majority that the "primary purpose" of a search policy is assessed by reference to "immediate purpose," emphasizing the legitimacy of the State's ultimate objective for the searches at issue, and concluding nonetheless that the searches were unconstitutional because "while the policy may well have served legitimate needs unrelated to law enforcement, it had as well a penal character with a far greater connection to law enforcement" than was justified "under our special needs rationale"). In petitioners' view, this case does not present that question because, as just observed in Part II.B, *supra*, the "immediate objectives" of IO-52 are, as defined by the majority in *Ferguson*, inextricably related to law enforcement. Taking the lower courts' findings of the "primary purpose" of IO-52 as correct, however, the case would present the question squarely.

Thus, if the lower courts and respondents are correct that IO-52's asserted purposes of maintaining the integrity of the police department, deterring intoxicated shootings, and immediately removing officers who have engaged in intoxicated shootings are the primary purposes and are "divorced from the State's general interest in law enforcement" (*Ferguson*, 532 U.S. at 79)—then this case presents an opportunity to clarify whether significant law enforcement entanglement and purpose in suspicionless drug-testing, whose primary purpose is civil, precludes "special needs" exemption.

III. The Decision Below Exacerbates A Conflict Among The Lower Courts As To The Scope Of The Special Needs Doctrine.

State supreme courts and federal courts of appeals have divided over the scope of the special needs doctrine in cases analogous to the instant case, with the majority rejecting programs similar to IO-52 as violative of the Fourth Amendment.

A. In the wake of *Skinner* and *Ferguson*, state supreme courts have divided on the constitutionality of statutes that, like IO-52, mandate suspicionless, post-incident substance testing as part of a police investigation of a public safety incident and of the possibly criminal conduct of the tested individuals in causing the injury or death of another person. The statutes differ from IO-52 only in that they mandate suspicionless substance testing of drivers following car accidents, rather than of police officers following shootings. Like respondents, most of the States in these cases invoked "special needs" or "compelling interests" in identifying and immediately removing a person who presents a threat to public safety and in deterring the dangerous conduct as justifications for avoiding the Fourth Amendment requirement of individualized suspicion as a predicate to testing.

Invoking *Skinner*, most of the state supreme courts reviewing such statutes have—in contrast to the Second Circuit below—found them unconstitutional. See, *e.g.*, *Cooper* v. *Georgia*, 587 S.E.2d 605 (Ga. 2003) (striking down Georgia "implied consent" statute requiring suspicionless breath, blood and urine testing of drivers involved in accidents resulting in serious injury or death); *McDuff* v. *Mississippi*, 763 So. 2d 850 (Miss. 2000) (invalidating comparable Mississippi provision); *Pennsylvania* v. *Kohl*, 615

A.2d 308 (Pa. 1992) (declaring unconstitutional a similar Pennsylvania statute, absent probable cause to believe that the driver was driving under the influence); see also *Alaska* v. *Blank*, 90 P.3d 156, 162 & n.34 (Alaska 2004) (to avoid unconstitutionality, construing statute to require "probable cause to search" and exigent circumstances as a predicate to a warrantless breath test, notwithstanding that the statute on its face required only "probable cause to believe that the person was operating * * * a motor vehicle * * * that was involved in an accident"). And the Supreme Court of Kentucky has sustained its statute against Fourth Amendment challenge only because the statute expressly requires reasonable ground for suspicion or probable cause to believe the driver was intoxicated as a predicate to the mandated breath or blood test for alcohol testing. See, *e.g. Helton* v. *Kentucky*, 299 S.W.3d 555, 563 (Ky. 2010).

While not declaring their State's "implied consent" statutes unconstitutional, still more state appellate courts have similarly held that the Fourth Amendment forbids use in criminal prosecutions of the results of breath and blood tests taken pursuant to such statutes unless the officers had probable cause to believe the driver was intoxicated. See, *e.g.*, *Arizona* v. *Quinn*, 178 P.3d 1190, 1195-1196 (Ariz. Ct. App. 2008) (holding that the Fourth Amendment forbade use in a criminal prosecution of suspicionless blood test results obtained pursuant to Arizona statute, but allowing use in civil proceedings to revoke driver's license); *Hannoy* v. *Indiana*, 789 N.E.2d 977, 983-988 (Ind. Ct. App. 2003) (invoking *Ferguson* and *Skinner* to hold that sheriff department's policy of obtaining blood samples without probable cause from drivers involved in accidents resulting in serious bodily injury or death was unconstitutional, but noting

constitutionality of statute that conditioned retention of a driver's license on consent to a chemical test if a driver is involved in an accident resulting in serious bodily injury or death).

Several of these courts expressly recognized the importance of the "special needs" of the States to (1) "remov[e] drunk drivers from the highways" (*Kohl*, 615 A.2d at 314), (2) "ensur[e] that only those qualified are permitted to operate motor vehicles" (*ibid.*), and/or (3) deter[] drunk driving (*Cooper*, 587 S.E.2d at 611)—"special needs" that precisely parallel those invoked by the City in this case of immediately removing intoxicated officers from duty and deterring officers from engaging in intoxicated shooting. Nonetheless, the courts found that the statutes, which, like IO-52, authorize suspicionless testing in the context of a police investigation into possibly criminal conduct, are also self-evidently designed "to enable the police to obtain evidence of intoxication or drug use to be utilized in criminal proceedings." *Kohl*, 615 A.2d at 314-315; accord, *e.g.*, *Cooper*, 587 S.E.2d at 611. These courts viewed the fact that positive results could regularly be used for criminal prosecution as dispositive of the unconstitutionality of the statutes. See *ibid.*; *Kohl*, 615 A.2d at 314; *McDuff*, 763 So.2d at 855. As one court explained: "[O]ur review of the Supreme Court's 'special needs' search and seizure cases leave[s] us with the firm belief that it did not, and does not, intend to expand that particular exception to the warrantless, suspicionless, nonconsensual drawing of a person's blood by law enforcement as part of a criminal investigation." *Hannoy*, 789 N.E.2d at 985.

The view is not unanimous, however. Like the majority of state supreme courts identified above, the

Supreme Court of Illinois initially held an Illinois statute mandating suspicionless blood and breath testing of drivers involved in serious accidents unconstitutional. *King* v. *Ryan*, 607 N.E.2d 154, 162 (Ill. 1992). It reasoned that, although the State had compelling interests in "remov[ing] intoxicated drivers from the road" and "deter[ring] others from driving while intoxicated," the statute could not "fall[] within the special needs exception" because it "is also intended to gather evidence for use in a criminal proceeding." *Id.* at 160. However, after the Illinois legislature revised the statute to delete the provision explicitly authorizing use of positive tests in criminal proceedings, the Illinois Supreme Court upheld it, notwithstanding its recognition that the test results would still routinely be used in criminal prosecutions. See *Fink* v. *Ryan*, 673 N.E.2d 281 (Ill. 1996). Observing that "the [U.S.] Supreme Court has not yet determined whether evidence obtained under the 'special needs' exception may be routinely used in criminal proceedings" (*id.* at 287), the court concluded that it could, provided such routine use for criminal prosecutions was only "incidental" to the primary purpose (*ibid.*). The Chief Justice and two other justices dissented. *Id.* at 288, 290.

The Maine statute authorizing suspicionless blood and breath testing of drivers who may have been responsible for a serious injury or death was also upheld, the court reasoning that (1) the State had a "special need" to investigate the causes of traffic accidents; and (2) the statute expressly prohibits use of test results in criminal prosecutions except where the State establishes that police investigators would have found independent probable cause to believe that the driver was impaired at the time of the accident had they not been too busy addressing the ex-

igencies of the accident to check. See *Maine* v. *Cormier*, 928 A.2d 753, 760 (Me. 2007) (upholding 29-A Me. Rev. Stat. § 2522(1) (2006)). The court distinguished *Ferguson* on the ground that "the Maine statute's approval of using test results in prosecutions in only limited circumstances demonstrates that the statute does not have law enforcement as its primary purpose." *Id.* at 763. Two justices dissented, observing that the statute allows the State to cobble together probable cause from after-acquired evidence it would not have inevitably discovered, and therefore would violate the Fourth Amendment absent a "special needs" exception, which they deemed unavailable under *Ferguson* because of the "law enforcement focus" of the statute. *Id.* at 765-767 (Levy & Calkins, JJ., dissenting).

The disarray among and within the state supreme courts on the question of the constitutionality of post-accident testing performed by police officers investigating the tested individuals for potentially criminal conduct illustrates the confusion left in the wake of *Skinner* and *Ferguson* and warrants the Court's attention.

B. Though the federal appellate courts have not been presented with policies identical to IO-52, a number have addressed analogous questions. The majority have concluded, in sharp contrast to the Second Circuit, that suspicionless searches performed by law enforcement or with extensive entanglement of law enforcement, in part to gather evidence of possible crimes, is unconstitutional, notwithstanding the presence of "special needs."

For example, the Fifth and Ninth Circuits held that a State's proffered "special need" to protect children is not sufficiently "'divorced from the state's

general interest in law enforcement'" to exempt joint social-services and law-enforcement searches into possible child abuse from the normal requirements of the Fourth Amendment. *Greene* v. *Camreta*, 588 F.3d 1011, 1029 (9th Cir. 2009) (quoting *Roe* v. *Texas Dep't of Protective & Reg. Servs.*, 299 F.3d 395, 406-407 (5th Cir. 2002) (in turn quoting *Ferguson*, 532 U.S. at 79)).[3] Detailing the statutory "entanglement of law enforcement and social services officials in the state's investigation of child abuse" from inception of a complaint through resolution, both circuits concluded that the searches "functioned 'as a tool both for gathering evidence for criminal convictions and for protecting the welfare of the child'" (*Greene*, 588 F.3d at 1028-1029 (quoting *Roe*, 299 F.3d at 406-407)); see also *Gates* v. *Texas Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 423-424 (5th Cir. 2008) (same). Confronted with those mixed purposes, the courts did not inquire, as did the Second Circuit, which one was "primary." Rather, invoking *Ferguson*, they concluded that the searches were unconstitutional because of the extensive involvement of law enforcement and the probability that if the results of the investigation were incriminating, criminal prosecutions would result. The Ninth Circuit observed: "'[n]one of [the Court's] special needs cases have * * * upheld the collection of evidence for criminal law enforcement purposes.'" *Greene*, 588 F.3d at 1027 (quoting *Ferguson*, 532 U.S. at 83 n.20); see also *ibid.*

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[3] Certiorari petitions have been filed seeking review of the Ninth Circuit's decision. *Greene* v. *Camreta*, No. 09-1454 (filed May 27, 2010), No. 09-1478 (filed June 1, 2010). If certiorari were to be granted in *Greene*, the Court should at least hold the instant petition.

(quoting *Ferguson*, 532 U.S. at 88 (Kennedy, J., concurring)).

In *Knox County Education Association* v. *Knox County Board of Education*, 158 F.3d 361 (6th Cir. 1998), the Sixth Circuit indicated that even reasonable-suspicion-based breath testing of school personnel that was otherwise constitutional would be unconstitutional if performed by police officers. See *id.* at 385. The court explained: "The problem with having law enforcement officers administer the test is that they will have immediate access to the results. This publication converts the testing from a matter peculiarly within the scope of the employment relationship to one which directly involves law enforcement authorities." *Ibid.* The court found it unnecessary to decide the question, however, because "it seems unlikely, especially in light of the Court's admonition here, that the Board would revert to having law enforcement officials conduct the test." *Id.* at 385 n.28.

In sum, the Second Circuit's interpretation of the scope of the special needs doctrine as applied to post-incident suspicionless searches stands in sharp conflict with numerous decisions of state supreme courts and several federal courts of appeals evaluating similar statutes and policies.

IV. The Issue Here Is Of Substantial Practical Importance And Is Recurring.

Whether police may subject individuals to suspicionless, nonconsensual drug testing in their investigation of public safety incidents, and use the results to prosecute the tested individuals, is a critical and recurring question. It affects the broad category of employees and citizens whose conduct implicates

public safety concerns, from law-enforcement and corrections officers, mass transit and ship workers, workers at energy facilities like power plants and oil rigs, to train, bus, truck, and automobile drivers, among many others. In every investigation of a public safety incident, from one as small as a car accident to one as large as a mass transit accident, suspicionless searches by police will always simultaneously serve not only a law-enforcement investigatory objective, but also several meritorious civil objectives including all the purposes the NYPD invokes here: to "deter" further intoxicated operations, to protect the safety of the public and workers by identifying and immediately "removing" any intoxicated operators, and/or to encourage public confidence in the sobriety of the operators.

Indeed, the potential reach of the court of appeals' rationale is far greater. The court's holding that a civil "primary purpose" exempts from the requirement of individualized suspicion even searches conducted by the police in part to gather evidence for criminal prosecutions would permit police drug-testing of broad swaths of the public. To start, schools seeking additional deterrent effect for their anti-drug programs could invite ***police*** to perform the suspicionless urinalysis testing of children who participate in athletics and extracurricular activities, which school officials themselves now conduct, and to prosecute children who test positive. That is because the "***primary*** purposes" of school drug-testing programs—to deter drug use and to protect children—are civil; and, according to the Second Circuit, law-enforcement entanglement and use of test results for prosecutions would not alter that analysis. Mass-transit, trucking, energy facility, and law-enforcement employers likewise could, under the

Second Circuit's decision, all enhance the deterrent effect of their existing employee drug-testing programs by sending positive test results to the police for criminal prosecutions, or inviting police themselves to do the testing, providing the primary purposes of such testing remained to investigate accidents, deter drug and alcohol abuse, or enhance the reputation of the organization. The Second Circuit's decision authorizes police to enter previously civil arenas without any individualized grounds for suspicion, but with testing kits.

The court of appeals' decision expands the "special needs" exception beyond the justification for its existence. Until now, "special needs" cases were a "closely guarded category of constitutionally permissible suspicionless searches" (*Chandler*, 520 U.S. at 309) with "***no*** law enforcement purpose" (*Ferguson*, 532 U.S. at 79 n.15 (emphasis added)). The Court created the special needs exception because, it found, searches conducted for civil purposes and in civil contexts constitute a lesser intrusion on the privacy interests protected by the Fourth Amendment than searches by law-enforcement officials investigating potential crimes. Cf., *e.g.*, *Ferguson*, 532 U.S. at 79-80; *O'Connor* v. *Ortega*, 480 U.S. 709, 717, 721-722 (1987). Where law-enforcement officials conduct the searches in part to investigate and gather evidence of possible crimes, that justification for an exception to the Fourth Amendment's ordinary requirements is extinguished.

The Court has held that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity* v. *State of New Jersey*, 385 U.S. 493, 500 (1967). Absent correction by the Court, dozens of NYPD officers will con-

tinue to be deprived every year of their constitutional right to be free of unreasonable searches in highly sensitive circumstances. They will be subjected to potentially humiliating testing after having risked their lives to save other citizens and protect our laws, even if they themselves have suffered severe physical injury (see CA App. 207-208), and regardless whether their actions and the soundness of their judgment in shooting are self-evidently beyond reproach.

Finally, the Second Circuit's rationale has things exactly backward. The court relied on the district court's conclusion that the "primary purpose" of the policy is not law enforcement because the officers tested were not intoxicated and the policy therefore had not produced prosecutions. See *supra*, pp. 8-9. The courts' reasoning overlooks the fact that the Fourth Amendment is designed to protect the privacy rights of the innocent as well as the guilty. Indeed, a dearth of prosecutions resulting from this policy would, if anything, only highlight the paucity of record evidence that intoxicated shootings are actually a "concrete danger" (*Chandler*, 520 U.S. at 319; see *supra*, pp. 8-9), further undermining the City's claim of "special needs."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2010

APPENDICES

APPENDIX A

08-5250-cv
Lynch v. The City of New York

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term 2009

(Argued November 18, 2009
Decided December 11, 2009)

Docket No. 08-5250-Cv

PATRICK J. LYNCH, as President of the Patrolmen's Benevolent Association of The City Of New York, Inc., PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.

Plaintiffs-Appellants,

v.

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, POLICE COMMISSIONER RAYMOND W. KELLY, of the New York City Police Department,

Defendants-Appellees.

Before KEARSE, CABRANES, and STRAUB, *Circuit Judges.*

Appeal from a September 30, 2008 order of the United States District Court for the Southern District of New York (George B. Daniels, *Judge*) denying plaintiffs' motion for a preliminary injunction. Plaintiffs, who are union representatives of police officers employed by the New York City Police Department ("NYPD"), challenge the constitutionality of an

NYPD policy that requires that a breathalyzer test be administered to every NYPD officer who causes injury or death as a result of firing his or her gun.

We hold as follows: (1) the District Court did not make a "clearly erroneous assessment of the evidence" when it found that the primary purpose of the breathalyzer policy was not the NYPD's "general interest in crime control" and thus fell under the "special needs" doctrine of our Fourth Amendment jurisprudence; (2) the fact that crime control was one purpose—but not the *primary* purpose—of the breathalyzer policy does not bar the application of the "special needs" doctrine to the breathalyzer policy; and (3) based on the record at this stage of the proceedings, the breathalyzer policy is reasonable under the three-factor balancing test of the "special needs" doctrine. We conclude, therefore, that the District Court's denial of plaintiffs' motion for a preliminary injunction was not an abuse of discretion.

Affirmed.

THOMAS P. PUCCIO (Michael T. Murray, *on the brief*), New York, NY, *for plaintiffs-appellants.*

JANE L. GORDON (Michael A. Cardozo, Corporation Counsel of the City of New York, and Edward F.X. Hart and Alan M. Schlesinger, of Counsel, *on the brief*), New York, NY, *for defendants-appellees.*

JOSÉ A. CABRANES, *Circuit Judge:*

Plaintiffs-appellants are union representatives of police officers employed by the New York City Police

Department ("NYPD" or "Department"). They brought this action in the United States District Court for the Southern District of New York (George B. Daniels, *Judge*) challenging the constitutionality of an NYPD policy that requires that a breathalyzer test—which measures the amount of alcohol in the bloodstream—be administered to an NYPD officer immediately after he or she causes injury or death as a result of firing his or her gun. Plaintiffs moved in the District Court to preliminarily enjoin the enforcement of the breathalyzer policy, and the District Court denied the motion. Plaintiffs now appeal the denial of the preliminary injunction. We affirm.

BACKGROUND

In November 2006, undercover NYPD officers in Queens, New York, shot and killed a man named Sean Bell, prompting intense and widespread criticism from the public. In the wake of the Bell shooting, the Commissioner of the NYPD appointed a committee to review the Department's undercover operations and to make recommendations for improvements. The committee was chaired by Chief Charles V. Campisi ("Campisi"), the head of the Internal Affairs Bureau of the NYPD, which is charged with investigating police misconduct.

The committee recommended, among other things, that a breathalyzer test be administered to any officer who fires his or her weapon and causes death or injury. The Police Commissioner accepted this suggestion and, in September 2007, promulgated Interim Order 52, which established the breathalyzer policy at issue in this action.

The breathalyzer policy applies when any NYPD officer "on or off duty, is involved in a firearms dis-

charge within New York City which results in injury to or death of a person." J.A. 50 (Interim Order 52). The policy first requires that senior NYPD officials be notified of a shooting, including officials from the Internal Affairs Bureau. The policy then requires that a "portable breathalyzer test" be administered "in a private setting" to the "uniformed member(s) of the service who discharged a firearm." *Id.* at 51. If the portable breathalyzer test yields a reading of blood alcohol level of 0.08 or greater—the legal limit for driving an automobile in New York State—the officer in question must be transported to an Internal Affairs Bureau testing facility where he or she will be given a second test on a more accurate "Intoxilyzer" machine. *Id.*

Plaintiffs brought this action against the City of New York, the NYPD, and Police Commissioner Raymond W. Kelly (collectively, "defendants"), claiming that the breathalyzer policy violates the Fourth Amendment to the United States Constitution. Plaintiffs moved to preliminarily enjoin the enforcement of the breathalyzer policy, and the District Court denied the motion. Plaintiffs could not, the District Court concluded, demonstrate a likelihood of success on the merits because the breathalyzer policy withstood Fourth Amendment scrutiny under the so-called "special needs" doctrine. *See Palladino v. City of N.Y.*, No. 07 Civ. 9246, 2008 WL 4539503 (S.D.N.Y. Sept. 30, 2008).

Plaintiffs brought this timely interlocutory appeal challenging the District Court's denial of the motion for a preliminary injunction.[1] *See* 28 U.S.C. §

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[1] In addition, defendants moved to dismiss the complaint—or, alternatively, for summary judgment—under

1292(a) ("[T]he courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts . . . refusing . . .injunctions.").

DISCUSSION

On appeal, plaintiffs argue that the District Court erred in evaluating plaintiffs' motion for a preliminary injunction under a "likelihood-of-success" standard, rather than the less rigorous "fairground-for-litigation" standard. Plaintiffs also argue that the District Court abused its discretion in denying the preliminary injunction because, in plaintiffs' view, the breathalyzer program is not reasonable under the "special needs" doctrine.

I. The District Court Correctly Applied the Likelihood-of-Success Standard

We have recognized two separate standards for whether a district court may grant a preliminary injunction:

> In general, the district court may grant a preliminary injunction if the moving party establishes (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the

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Federal Rule of Civil Procedure 12(b)(6), and the District Court denied defendants' motions in the same ruling in which it denied plaintiffs' motion for a preliminary injunction. We do not have jurisdiction to review the denial of defendants' motions on this interlocutory appeal. *See* 28 U.S.C. § 1291 (providing that the courts of appeals have general appellate jurisdiction only over "final decisions of the district courts").

> hardships tipping decidedly in favor of the moving party.

Plaza Health Labs., Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989) (citation omitted). Nevertheless, we have held that

> *where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme*, the district court should not apply the less rigorous fair-ground-for-litigation standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim.

Id. (emphasis added); *accord, e.g., Alleyne v. N.Y. State Educ. Dep't*, 516 F.3d 96, 101 (2d Cir. 2008). Here, plaintiffs argue that the "less rigorous fair-ground-for-litigation standard" should apply to their motion for a preliminary injunction, whereas defendants argue that the more rigorous likelihood-of success standard should apply. The District Court applied the likelihood-of-success standard, and we agree that that was the correct standard to apply in the circumstances presented here.

First, as discussed in more detail below, the breathalyzer program qualifies as "governmental action taken in the public interest," *Plaza Health*, 878 F.2d at 580, because it was designed, among other things, to discourage officers from using their firearms while intoxicated—which is plainly a matter of public concern. Second, the breathalyzer program constitutes "government action taken . . . pursuant to a statutory or regulatory scheme," *id.*, because the NYPD Commissioner promulgated Interim Order 52

under his statutory authority to regulate the police force. *See* N.Y. City Charter § 434 (providing that the Commissioner is the "chief executive officer of the police force" and "shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department" and "shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department"); *see also* N.Y. City Admin. Code § 14-115 (providing that the Commissioner has broad discretion over the discipline of the police force). Accordingly, the District Court correctly held that plaintiffs must demonstrate a "likelihood of success on the merits" in order to secure a preliminary injunction in this action. *Plaza Health*, 878 F.2d at 580.

II. The District Court's Denial of the Preliminary Injunction Was Not an Abuse of Discretion

We review the denial of a preliminary injunction for abuse of discretion. *See, e.g., Alleyne*, 516 F.3d at 100. A district court has abused its discretion if it has (1) "based its ruling on an erroneous view of the law," (2) made a "clearly erroneous assessment of the evidence," or (3) "rendered a decision that cannot be located within the range of permissible decisions." *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks omitted); *cf. United States v. Hasan*, No. 08-4921-cr, — F.3d —, 2009 WL 3737521, at *4-5 (2d Cir. Nov. 10, 2009) (explaining "abuse of discretion").

The parties do not dispute that, assuming the breathalyzer program violates the Fourth Amendment, plaintiffs have demonstrated "irreparable harm." *See, e.g., Covino v. Patrissi*, 967 F.2d 73, 77

(2d Cir. 1992) (concluding that a possible deprivation of constitutional rights sufficiently demonstrated a likelihood of irreparable harm). It is also uncontested that the breathalyzer tests at issue here constitute "searches" and are therefore subject to the strictures of the Fourth Amendment. *See, e.g., Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989).

The principal question, therefore, is whether plaintiffs have demonstrated a "likelihood of success on the merits." *Plaza Health*, 878 F.2d at 580. That question, in turn, depends on whether, on this record, the breathalyzer program is not "reasonable" under the Fourth Amendment.

"The Fourth Amendment requires that searches and seizures be reasonable," and a "search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). Nevertheless, the Supreme Court has "upheld certain regimes of suspicionless searches where the program was designed to serve special needs, beyond the normal need for law enforcement." *Id.* (internal quotation marks omitted); *see also United States v. Amerson*, 483 F.3d 73, 80-81 (2d Cir. 2007) (summarizing the recent case law of the Supreme Court and this Circuit addressing the "special needs" doctrine).

A "program" or "general scheme" of searches qualifies for treatment under the special needs doctrine only if the program's "primary purpose" is *not* a "general interest in crime control." *Edmond*, 531 U.S. at 38, 46, 48; *accord Ferguson v. City of Charleston*, 532 U.S. 67, 83-84 (2001) (holding that the special needs doctrine does not apply to searches whose "immediate objective" is "to generate evidence *for law enforcement purposes*"); *Nicholas v. Goord*, 430

F.3d 652, 663 (2d Cir. 2005) (clarifying that the "special needs" doctrine applies only when the "searches serve as their immediate purpose an objective distinct from the ordinary evidence gathering associated with crime investigation").

Thus, in order to determine whether the special needs doctrine applies, a court must conduct "an inquiry into purpose at the programmatic level." *Edmond*, 531 U.S. at 46. In "'ordinary, probable cause Fourth Amendment analysis,'" a court does not investigate the purpose behind a search, as an "individual officer's subjective intentions are irrelevant to the [search's] Fourth Amendment validity." *Id.* at 45 (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)). But in the context of the "special needs" doctrine, a court must consider the "programmatic purpose" of the searches at issue, applying the "special needs" doctrine only if the primary programmatic purpose of the searches is unrelated to the government's general interest in crime control. *Id.* at 46.

If the court makes such a finding—that is, if the court finds that the primary purpose of a program of searches is a "special need" and not a general interest in crime control—the court must then conduct a "context-specific inquiry" into the "reasonableness" of the program, weighing "'the special need . . . against the privacy interest advanced.'" *Amerson*, 483 F.3d at 83 (quoting *Cassidy v. Chertoff*, 471 F.3d 67, 75 (2d Cir. 2006)). That task is accomplished by means of a "balancing test" that is "based on an examination of three factors: '(1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs.'" *Id.* at 83-84 (quoting

Cassidy, 471 F.3d at 75); *see also Illinois v. Lidster*, 540 U.S. 419, 427 (2004). The program of searches passes constitutional muster if it is "reasonable" under that three-factor balancing test. *Amerson*, 483 F.3d at 83.

A. The District Court Properly Applied the Special Needs Doctrine

Plaintiffs argue that the special needs doctrine should not apply to the breathalyzer policy at issue here because the policy's primary purpose is furthering the NYPD's "general interest in crime control." *Edmond*, 531 U.S. at 48. Defendants dispute that claim and argue that the primary purpose of the breathalyzer policy is unrelated to crime control.

The record shows that the breathalyzer policy has multiple purposes. Some of the policy's purposes are related to "special needs" apart from the NYPD's general interest in crime control, but one of its purposes is directly related to the NYPD's role as an investigator of crimes.[2]

In opposition to plaintiffs' motion for a preliminary injunction, defendants submitted evidence—most notably an affidavit of Campisi, the chair of the committee that recommended the breathalyzer policy—showing that the breathalyzer policy was de-

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[2] Interim Order 52, the order that created the breathalyzer program, defines the program's purpose as follows:

> To ensure the highest levels of integrity at the scene of police involved firearms discharges which result in injury to or death of a person, on or off duty, within New York City.

J.A. 50. Evidence in the record casts light on the meaning of that language and provides additional purposes for the breathalyzer program.

signed to address several issues unrelated to crime control. First, the NYPD conducts a detailed administrative review every time an officer fires his or her gun, and the breathalyzer program facilitates that review. To that end, it ensures that an officer who fires his or her gun while intoxicated—a clear violation of NYPD policy—can be quickly disciplined or removed from duty. That aim is not related to crime control; it is related to personnel management. The point is not to prosecute the offending officers but to remove them from duty or to impose on them internal, employment-related sanctions.

The breathalyzer program also operates as a deterrent to officers who may consider carrying their firearms while under the influence of alcohol. The NYPD acknowledges that some of its officers have alcohol problems, and the NYPD requires its officers to take precautions to avoid carrying their firearms into off-duty situations in which they may become intoxicated. Thus, the breathalyzer policy is designed to convey to NYPD officers the message that alcohol-related firearms incidents are likely to be discovered, providing an extra incentive to the officers to follow the NYPD's regulations regarding firearms and alcohol. Here again, the NYPD's interest is not in crime control but in personnel management; the breathalyzer program, in this respect, is more concerned with encouraging officers to follow the NYPD's internal safety policies than with prosecuting NYPD officers who violate the law. In this sense, this case very much resembles *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (upholding drug tests of railway employees immediately following serious train accidents in order to discipline those employees involved in the accident who had tested positive for drug use).

Another purpose of the breathalyzer program—apart from crime control—is promoting the NYPD's reputation among New York City residents. There is no dispute that the breathalyzer program was put in place in response to the shooting of Sean Bell, a widely publicized incident that generated criticism of the NYPD by some members of the public. In this context, the breathalyzer program is an effort to promote public confidence in the NYPD by showing the public that the NYPD takes seriously its policies regarding alcohol and firearms. Moreover, when an officer fires his or her gun while *not* under the influence of alcohol, a breathalyzer test assures the public that the officer was fit for duty when he or she chose to fire. Here, the NYPD's interest is in maintaining strong community relations, not in crime control.

Nevertheless, even though the record shows that several of the purposes of the breathalyzer program are unrelated to crime control, the record also shows that one of the program's purposes is directly related to crime control. The NYPD acknowledges that it treats every shooting involving an officer as a potential crime and that the breathalyzer results could be used as evidence in a criminal investigation of the officer who was tested. In other words, to the extent that a police officer commits a crime by firing his or her gun, the NYPD is charged with investigating that crime, and the breathalyzer program is meant to be one investigatory tool at the NYPD's disposal.

There are, therefore, multiple purposes of the breathalyzer policy—some unrelated to crime control and one directly related to crime control—and the critical question in determining whether the special needs doctrine applies is whether the NYPD's gener-

al interest in crime control is the policy's "*primary* purpose." *Edmond*, 531 U.S. at 48 (emphasis added).

The District Court concluded that plaintiffs had failed to show a likelihood that they could prove that the NYPD's general interest in crime control is the primary purpose of the breathalyzer policy. In the District Court's words, "plaintiffs have proferred no evidence that [Interim Order] 52 is a regulation primarily concerned with law enforcement," nor have plaintiffs "shown that a primary purpose of the regulation is to generate evidence for prosecution." *Palladino*, 2008 WL 4539503, at *5. We hold that the District Court did not err in reaching that conclusion.

We also hold that, having found that the primary purpose of the breathalyzer policy was not crime control, the District Court correctly applied the special needs doctrine to evaluate the policy. Here we must clarify one aspect of law surrounding the "special needs" doctrine: the special needs doctrine applies to any program of searches whose "primary purpose" is a government interest other than crime control, *Edmond*, 531 U.S. at 46-48, and the mere fact that crime control is *one* purpose—but not the *primary* purpose—of a program of searches does not bar the application of the special needs doctrine.

That conclusion, we think, derives naturally from prior case law. For example, in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), the Supreme Court upheld highway sobriety checkpoints whose primary purpose was "reducing the immediate hazard posed by the presence of drunk drivers on the highways," *Edmond*, 531 U.S. at 39. We have no doubt, however, that aiding criminal prosecutions of drunk drivers was *another* purpose of the checkpoints. It was simply not the checkpoints' *primary*

purpose. Likewise, in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Supreme Court upheld border patrol checkpoints whose primary purpose was "intercept[ing] illegal aliens" and promoting "the Government's interests in policing the Nation's borders," *Edmond*, 531 U.S. at 37-38. Nonetheless, aiding criminal prosecutions of smugglers of illegal immigrants was, we think, *one* purpose of the boarder patrol checkpoints. It was simply not the checkpoints' *primary* purpose. And in *Cassidy*, this Circuit upheld baggage screening procedures whose primary purpose was "to detect and deter a potential 'transportation security incident.'" 471 F.3d at 70. That is not to say, of course, that aiding investigations and prosecutions of would-be terrorists was not *one* purpose of the baggage screening procedures. It was simply not the screening procedures' *primary* purpose.

Thus, even if crime control is *one* purpose of a program of searches, the program may nevertheless be reasonable under the special needs doctrine so long as crime control is not the program's primary purpose. As a result, even though the District Court found that crime control was one purpose of the breathalyzer policy, the Court correctly applied the special needs doctrine upon finding that crime control was not the policy's *primary* purpose.

B. The Breathalyzer Policy Is Reasonable Under the "Special Needs" Balancing Test

After determining that the special needs doctrine applies, the next step of the inquiry is to assess the reasonableness of the breathalyzer policy by weighing "'the special need . . . against the privacy interest advanced'" under a three-factor balancing test.

Amerson, 483 F.3d at 83 (quoting *Cassidy*, 471 F.3d at 75). The District Court declined to conduct this step of the inquiry, explaining that it would do so only "[o]n the basis of a fully developed record at the appropriate time." *Palladino*, 2008 WL 4539503, at *5 n.7. Nevertheless, to determine whether the District Court properly denied the motion for a preliminary injunction, we can and should conduct this step of the inquiry. *See, e.g.*, *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63 (2d Cir. 1997) ("It is beyond cavil that an appellate court may affirm the judgment of the district court on any ground appearing in the record.").

First, as to the "the nature of the privacy interest involved," *Cassidy*, 471 F.3d at 75, we note that NYPD officers, like all law enforcement officials, "have a diminished expectation of privacy" when it comes to carrying and using firearms. *See Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989) (upholding a drug testing program for employees of the United States Customs Service in part because "Customs employees . . . who are required to carry firearms in the line of duty . . . have a diminished expectation of privacy in respect to the intrusions occasioned by a [drug test]"). Indeed, NYPD officers are already subject to drug screening as part of their employment in the NYPD,[3] and al-

[3] An NYPD officer is subject to drug or alcohol tests at many different times in his or her career, including when an officer first enters service in the NYPD as a probationary police officer and again at the end of the officer's probationary period; when an officer applies for specialty assignments, such as an assignment to the NYPD's Organized Crime Control Bureau; when there is a reasonable suspicion that an officer has ingested a controlled sub-

though breathalyzer testing may be intrusive in some workplaces, the "operational realities of the workplace" for NYPD officers "render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts." *Id.* at 671 (internal quotation marks omitted).

Second, as to "the character and degree of the governmental intrusion," *Cassidy*, 471 F.3d at 75, we note that NYPD officers who discharge their weapons are, under separate, preexisting NYPD policies, already subject to close scrutiny in the form of an administrative investigation. Thus, we do not think that a breathalyzer test is an "unexpected intrusion[] on privacy." *Von Raab*, 489 U.S. at 672 n.2; *see also Martinez-Fuerte*, 428 U.S. at 559 (upholding highway checkpoints in part because motorists "are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints"). In addition, the breathalyzer policy is applied uniformly in every situation in which an NYPD officer causes injury by firing his or her gun. As a result, the breathalyzer policy does not "carry the grave potential for 'arbitrary . . . interference with . . . privacy[']. . . that the Fourth Amendment was designed to prevent." *Von Raab*, 489 U.S. at 672 n.2 (quoting *Martinez-Fuerte*, 428 U.S. at 554).

Third, as to the "the nature and immediacy of the government's needs" and "the efficacy of its policy in

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stance; and when an officer has been placed on disciplinary probation because he or she caused injury by driving a motor vehicle while intoxicated. NYPD officers are also subject to random drug tests throughout their service in the NYPD.

addressing those needs," *Cassidy*, 471 F.3d at 75, we think that the government's needs here are manifest and that the breathalyzer policy straightforwardly addresses those needs. Like the Customs Service employees in *Von Raab*, NYPD officers "who may use deadly force plainly 'discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.'" 489 U.S. at 670 (quoting *Skinner*, 489 U.S. at 628). Thus, the NYPD's regulations involving alcohol and firearms are vital to public safety, and the NYPD has a substantial interest in detecting and disciplining officers who violate those policies. The NYPD also has a substantial interest in deterring its officers from using their firearms while intoxicated. *Cf. Cassidy*, 471 F.3d at 70 (upholding baggage screening procedures whose purpose was, in part, to "deter" terrorist attacks). Indeed, the breathalyzer policy may actually promote the purpose of the Fourth Amendment. As the Supreme Court has noted, "ensuring against the creation of this dangerous risk will itself further Fourth Amendment values, as the use of deadly force may violate the Fourth Amendment in certain circumstances." *Von Raab*, 489 U.S. at 671 (citing *Tennessee v. Garner*, 471 U.S. 1, 7-12 (1985)). By quickly and unequivocally determining whether alcohol was involved in an NYPD officer's use of his or her firearm, the breathalyzer policy will assist the NYPD in disciplining officers who use their firearms while intoxicated and will provide an incentive to officers to stow their firearms before drinking alcohol.

Finally, we recognize that the NYPD's reputation in the eyes of the public is directly tied to its effectiveness as a police force. *See, e.g., Pappas v. Giuliani*, 290 F.3d 143, 149 (2d Cir. 2002) (explaining that

negative "public perception . . . [can] harm the mission of the Police Department"); *see also Lidster*, 540 U.S. at 425 (noting that information volunteered by the public plays a "vital role in police investigatory work"). Thus, to the extent that the breathalyzer policy improves the NYPD's public reputation, it furthers an important governmental interest.

In light of each of these factors, we conclude that "'the special need[s]'" asserted by the NYPD outweigh the "'privacy interest advanced'" by plaintiffs. *Amerson*, 483 F.3d at 83 (quoting *Cassidy*, 471 F.3d at 75). Accordingly, we hold that, on the record before us, plaintiffs have not demonstrated a "likelihood of success on the merits," *Plaza Health*, 878 F.2d at 580, because the breathalyzer program is reasonable under the Fourth Amendment, based on this record. As a result, the District Court did not abuse its discretion in denying plaintiffs' motion for a preliminary injunction.

CONCLUSION

In summary:

(1) The NYPD's breathalyzer policy constitutes "governmental action taken in the public interest pursuant to a statutory or regulatory scheme," and thus the District Court correctly applied the likelihood-of-success standard in evaluating plaintiffs' motion for a preliminary injunction.

(2) The District Court did not commit clear error in finding that the primary purpose of the breathalyzer policy was not the NYPD's general interest in crime control.

(3) The fact that crime control is *one* purpose – but not the *primary* purpose—of a program of searches does not bar the application of the special

needs doctrine. Thus, even though the District Court found that crime control was one purpose of the NYPD breathalyzer policy, the District Court correctly applied the special needs doctrine after finding that crime control was not the primary purpose of the policy.

(4) Applying the special needs doctrine's three-factor balancing test, the NYPD breathalyzer program is reasonable under the Fourth Amendment based on the record at this stage of the proceedings.

Accordingly, the District Court did not err in denying plaintiffs' motion for a preliminary injunction, and the September 30, 2008 order of the District Court is **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL PALLADINO, as President of the Detectives' Endowment Association, et al.,
PATRICK LYNCH, as President of the Patrolmens' Benevolent Association, et al.,
ROY T. RICHTER, as President of the Captains' Endowment Association, et al.,
Plaintiffs,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE DEPARTMENT, and RAYMOND W. KELLY, as COMMISSIONER of the NEW YORK CITY POLICE DEPARTMENT,
Defendants.

MEMORANDUM DECISION AND ORDER
07 CV 9246 (GBD)
07 CV 9337 (GBD)
07 CV 10359 (GBD)

GEORGE B. DANIELS, District Judge:

Plaintiffs, three union organizations representing separately the officers of the New York City Police Department ("NYPD") in the ranks of Detective, Sergeant, and Lieutenant (the "Palladino Plaintiffs"); Police Officer (the "Lynch Plaintiffs"); and Captain (the "Richter Plaintiffs"), bring the instant three individual actions challenging NYPD Interim Order

("IO") 52, which requires that a Breathalyzer test be administered to any NYPD officer involved in a shooting that results in injury or death to a person in New York City. They challenge IO 52 as an unconstitutional search in violation of the Fourth and Fourteenth Amendments.[1] [2]

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[1] The Richter plaintiffs further contend that IO 52 violates due process guarantees.

[2] The Palladino plaintiffs also make an additional challenge to the interim order, asserting that IO 52 is void for vagueness. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Arriaga v. Mukasey*, 521 F.3d 219, 222 (2d Cir. 2008) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)). The "void for vagueness" doctrine is typically applied to criminal legislation and laws with civil penalties receive less exacting vagueness scrutiny. Plaintiffs fail to show that IO 52 is unconstitutionally vague; on its face, the plain language of IO 52 is not vague, and at this time, there is no evidence in the record on which this Court may evaluate whether or not IO 52 is vague "as applied" to plaintiffs. To date, there is no evidence before this Court that IO 52 and its enforcement fails to provide (A) sufficient notice and (B) limits on the discretion of law enforcement authorities. *See Kolender*, 461 U.S. at 357, 103 S.Ct. At 1858, 75 L.Ed.2d 903; *see Thibodeau v. Portuondo*, 486 F.3d 61, 65-66 (2d Cir. 2007) (discussing the test employed in "as applied" vagueness statutes).

All plaintiffs moved for a preliminary injunction prohibiting the enforcement of IO 52. Defendants opposed the motion, and moved to dismiss, or in the alternative, for summary judgment. The Palladino plaintiffs cross-moved for summary judgment.

Plaintiffs' motion for a preliminary injunction is denied. Defendants' motions to dismiss and for summary judgment are denied. The Palladino plaintiffs' cross-motion for summary judgment is denied.

BACKGROUND

Recognizing the need for an exceptionally fit and alert police force, the NYPD has acted to address issues of alcohol use and abuse amongst its officers. To that end, the police department set up an anonymous counseling unit for officers dealing with substance abuse issues. The NYPD also put in place various regulations, which establish fitness and sobriety expectations for officers.[3] In 2002, the NYPD issued regulations creating disciplinary measures against officers found to be operating motor vehicles while intoxicated. The regulations supplemented preexisting police protocol requiring random drug testing of all officers and targeted testing of officers where there is reasonable suspicion of controlled substance use. Declaration Internal Affair Bureau Chief Charles V. Campisi ("Campisi Decl.") ¶ 14-17. The NYPD also requires that firearms be removed from any officer, on duty or off duty, who is intoxicated. *Id.* ¶ 24.

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[3] *See e.g.*, Patrol Guide 203-04 (requiring that officers: 1) Be fit for duty at all times, except when on sick report; and 2) not consume intoxicants to the extent that member becomes unfit for duty).

On September 30, 2007, after a police shooting in Queens, which resulted in the death of Sean Bell, the Police Commissioner issued another alcohol testing measure, IO 52 entitled "Alcohol Testing For Uniformed Members of the Service Involved in Firearms Discharges Resulting in Injury To or Death Of A Person". IO 52 lays out the protocol for police officers and the police department following any shooting involving a uniformed member of the service that results in injury or death of a person. The protocol requires the uniformed patrolman to immediately request the response of a patrol supervisor. The patrol supervisor subsequently notifies the Operations Unit that a shooting has occurred. He or she then requests the response of the Internal Affairs Duty Captain and personnel, the Patrol Services Bureau Duty Inspector, and the Duty Captain. The Duty Captain is responsible for informing the member who discharged a weapon that he or she must undergo alcohol testing. The Internal Affairs Duty Captain then conducts the alcohol test using a portable Breathalyzer test ("PBT") device. The alcohol test is administered privately. If the reading on the PBT device is less that .08, no further testing is required. If the reading from the breath test is greater than .08, the police officer is taken to the Internal Affairs Bureau testing facility to take another alcohol test using an Intoxilyzer machine.

The New York City Police Department states that the purpose behind IO 52 is "to ensure the highest levels of integrity at the scene of police involved firearms discharges which result in injury or death of a person, on or off duty, within New York City." Text of Interim Order 52, attached as Exhibit A to Defendants' Notice of Motion, Nov. 7, 2007 at 1.

Plaintiffs seek a preliminary injunction against the enforcement of IO 52. Plaintiffs assert that, notwithstanding the NYPD's stated rationale for IO 52, the alcohol tests constitute an unreasonable search in violation of the Fourth Amendment. Plaintiffs also claim that "alcohol testing of NYPD Police Officers without reasonable suspicion is wholly unnecessary," because "[t]here are more than sufficient procedural protections already in place in the NYPD to ensure that officers who discharge their weapons while unfit for duty are detected and their firearms removed." Declaration of David M. Nicholson ¶ 3.

Within a week after IO 52 went into effect, at least 4 police officers were subject to alcohol exams conducted pursuant to the order. On October 3, 2007, three police officers underwent alcohol testing after they returned fire on a suspect who shot at them with a semiautomatic weapon. *Id.* ¶5. Shortly thereafter, on October 6, 2007, an off-duty officer "was involved in a critical incident," which plaintiffs claim, "required him to discharge his weapon–consistent with his training, Department policy and the law–to protect himself and the lives of others." *Id.* Plaintiffs contend that the officer was "sequestered" at a hospital for testing following the shooting, and subjected to the "embarrassment of a Breathalyzer test." *Id.* In both instances, none of the officers tested positive for alcohol use. No criminal charges have been filed against any of the four officers in connection with these incidents, nor have the test results been used in any criminal prosecution against the police officers.

MOTION TO DISMISS

Defendants have moved to dismiss the complaint, or in the alternative, for summary judgment.[4] Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes dismissal of a complaint that states no actionable claim. In considering a motion to dismiss, this Court "must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant." *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir.1994). Dismissal is only warranted if it appears beyond a reasonable doubt that the non-moving party can prove no set of facts in support of his or her claim which would entitle them to relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

Each of plaintiffs' complaints prays this Court to resolve a serious federal question–whether the enforcement of IO 52 constitutes an unreasonable search in violation of the United States Constitution. The complaints allege that, pursuant to IO 52, a suspicionless search occurs and that such a search is unreasonable. The Lynch plaintiffs further allege that since the implementation of IO 52, at least four NYPD officers have actually been subjected to alcohol testing pursuant to IO 52's mandates, and that such testing violated the officers' constitutional rights to be free from unreasonable searches. The Palladino plaintiffs also allege that IO 52 is uncons-

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[4] Defendants' motion and plaintiffs' cross-motion for summary judgment are denied without prejudice to renew. At this stage of litigation, where there has been extremely limited discovery, defendants and plaintiffs have both failed to make the requisite showing that no issue of material fact exists. Thus, both motions are premature.

titutionally vague. The Richter plaintiffs allege that IO 52 violates due process guaratees under the constitution.

In support of their motion to dismiss, defendants assert that IO 52 is constitutionally valid under existing case law. Defendants argue that the purpose, implementation, and circumstances under which the interim order will be executed are all constitutionally permissible. However, defendants' conclusory assertions do not overcome the liberal pleading requirements afforded plaintiffs upon review of their complaint. It is appropriate to determine the constitutionality of IO 52, after the development of a full evidentiary record, and not merely on the basis of defendants' conclusory arguments.

PRELIMINARY INJUNCTION

While plaintiffs have adequately pled their claims to withstand a motion to dismiss, the allegations in plaintiffs' complaints are insufficient to warrant granting a preliminary injunction. "A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Sussman v. Crawford*, 488 F.3d 136, 139-40 (2d Cir. 2007) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). The minimum standard for preliminary injunctive relief is a clear showing of: (1) irreparable injury to the movant in the absence of injunctive relief[5]; and (2) either, a li-

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[5] Plaintiffs allege irreparable injury, in the form of disruption of constitutional rights and invasion of protected privacy interests. In their opposition briefs and supporting documents, defendants do not contest plaintiffs' allegations of irreparable injury. A threat to the right to be

kelihood of success on the merits, or sufficiently serious questions going to the merits and a balance of hardships decidedly tipping in movant's favor. *See Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996).

Where plaintiffs seek to enjoin government action, however, the burden of proof increases. The Second Circuit Court of Appeals has recently reiterated that in instances where a party seeks to enjoin government action, "the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard." *Sussman*, 488 F.3d at 140 (quoting *Wright v. Giuliani*, 230 F.3d 543, 547 (2d Cir. 2000)).

In order to succeed at the preliminary injunction stage, plaintiffs must show their Fourth Amendment challenge to IO 52 is likely to succeed on the merits. That is, plaintiffs must show that there is likely a search or seizure, which is unreasonable. *See e.g. Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). Generally, "a search is unreasonable unless supported by a warrant issued upon probable cause. . .However, neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *MacWade v. Kelly*, 460 F.3d 260, 268 (2d Cir. 2006) (quoting *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) (internal citations and quotations omitted)).

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free from unreasonable searches, a fundamental constitutional right, may constitute irreparable injury. *See Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992).

Subjecting police officers to a Breathalyzer exam, without a warrant, probable cause, or individualized suspicion, may constitute a search, which in turn, ignites a Fourth Amendment inquiry. This Court must therefore continue its Fourth Amendment inquiry to determine if such searches are likely constitutionally violative; that is, that they are unreasonable. *See Skinner*, 489 U.S. at 618-19, ("For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable.") "What is reasonable. . .depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Id.* at 619 (citations omitted).

Where a search is conducted without individualized suspicion, constitutional inquiry requires: (1) that the search "is justified when special needs, beyond the ordinary needs for law enforcement"; and (2) "the search was reasonable in light of that special need. . . by weighing the government's interest against the intrusion on [plaintiffs'] privacy interests. *United States v. Amerson*, 483 F.3d 73, 79 n. 6 (2d Cir. 2007).

Notwithstanding the presumptive warrant rule, warrantless searches have been upheld where "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *See e.g., Skinner*, 489 U.S. at 619. The Skinner Court upheld drug and alcohol testing regulations put in place by the Federal Railroad Administration to encourage employee sobriety, thereby decreasing the occurrence of alcohol- related accidents. Certain regulations mandated breath and urine tests of employees involved in certain train accidents. Other regulations authorized the adminis-

tration of such tests on employees who violated certain safety rules. The United States Supreme Court has specifically applied the special needs exception to uphold searches where there is a legitimate public safety concern. *See, e.g., id.*[6]

Courts are to balance the government's interest in public safety against the individual privacy interests implicated by a search. *Id.* Finding a special need for the regulation, the Skinner Court ruled in favor of a balancing test that found the government interest in safety weightier than the privacy interests of railway workers. 489 U.S. at 621; *see also, Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding as reasonable a regulation requiring drug testing for customs officials who applied to promotions where the job directly involved the interdiction of illegal drugs or required the employee to carry a firearm).

Not every stated governmental interest, however, is sufficient to bring a regulation or search within the special needs exception. Where a regulation's primary purpose is "to generate evidence for law enforcement purposes," that regulation "does not fit within the closely guarded category of special needs." *Ferguson v. Charleston*, 532 U.S. 67 (2001); *see also Amerson*, 483 F.3d at 80. Where a search has, as its primary purpose, the generation of evidence for law enforcement purposes, specifically prosecution based

---

[6] The United States Supreme Court explained, "[t]his governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty. *Skinner*, 489 U.S. at 621.

on that evidence, such a search may not withstand constitutional scrutiny. *See e.g.*, *Ferguson*, 532 U.S. at 81; *cf. Von Rabb*, 489 U.S. at 666 (upholding search where drug test results of Customs Service personnel were not used in criminal prosecutions without the consent of the employee). Where "the threat [of law enforcement intervention] [is] *essential* to the program's success," such programs cannot escape the warrant requirement. *Ferguson*, 532 U.S. at 72 (emphasis added).

In contrast, where there is "no misunderstanding about the purpose of the test or the potential use of the test results," where there are "protections against the disseminations of the results to third parties," and where drug testing programs are "divorced from the State's general interest in law enforcement", those tests may be upheld under special needs analysis. *Id.*

To date, no court has opined as to whether a test conducted with a mixed-motive purpose–testing concerned primarily with non-law-enforcement goals and incidentally concerned with law enforcement goals–would qualify for special needs analysis. *See Skinner*, 489 U.S. at 621, n. 5 ("While this provision might be read so broadly to authorize the release of biological samples to law enforcement authorities, the record does not disclose that it was intended to be, or has actually been, so used. Indeed, while respondents aver generally that test results might be made available to law enforcement authorities. . .they do not seriously contend that this provision, or any other part of the administrative scheme, was designed as a pretext to enable law enforcement authorities to gather evidence of penal law violations" (internal quotations omitted)).

At this stage in the proceedings, plaintiffs have not sufficiently shown, in contravention to defendants' assertions, that IO 52 and its enforcement likely does not constitute a special need. As in *Skinner*, the City of New York has a substantial interest in the safety of its citizens, visitors, and the police department. Defendants contend that a sober police force serves to further that interest and that IO 52 encourages sobriety. Morever, plaintiffs have proffered no evidence that IO 52 is a regulation primarily concerned with law enforcement. To date, there has been no evidence proffered that alcohol monitoring of police officers pursuant to the regulation has been used primarily for any other purpose than deterring alcohol consumption and increasing public confidence in police force action following a shooting. Moreover, plaintiffs have not argued, nor cited any evidence to conclude, that IO 52 has been applied in any particular manner that uniquely raises specific constitutional violations beyond their general challenge to the need for such a regulation.

Aspects of law enforcement, such as the use of police personnel to collect Breathalyzer samples, are undoubtedly involved in the administration of IO 52. However, at this juncture, plaintiffs have not shown that a primary purpose of the regulation is to generate evidence for prosecution. In fact, none of the four police officers cited, who have been subjected to Breathalyzer tests as a result of IO 52, were subject to prosecution or even found to be intoxicated.

Plaintiffs have not argued that the text of IO 52 and the safety and reputation rationales proffered by defendants were crafted as pretext to enable the gathering of evidence against police officers for criminal prosecution. Absent a persuasive showing that

the NYPD's Breathalyzer testing is pretextual, it is to be initially assessed in light of its stated administrative purpose. No officer has been subject to criminal prosecution following an IO 52 search. At most, plaintiffs have alleged that criminal prosecution of offending officers may be an incidental purpose and future intended consequence of IO 52. The present record before this Court cannot support a conclusion that significant privacy concerns rise to an unconstitutionally prohibited level. On the record, as it presently exists, plaintiffs' allegations are insufficient to warrant a preliminary injunction.[7]

CONCLUSION

Plaintiffs' motions for preliminary injunction and cross-motions for summary judgment are DENIED. Defendants' motions to dismiss, or in the alternative, for summary judgment, are DENIED.

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[7] On the basis of a fully developed record at the appropriate time, this Court will consider the reasonableness of alcohol testing pursuant to IO 52 by weighing the City's interest in safety against the patrolmen's privacy interests. *See Von Raab*, 489 U.S. at 665-66 ("where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy against the Government's interests"); *see also Cassidy v. Chertoff*, 471 F.3d 67, 75 (2d Cir. 2006).

Dated: September 30, 2008
New York, New York

SO ORDERED:

s/
GEORGE B. DANIELS
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 25th day of February, two thousand ten.

PATRICK J. LYNCH, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.

Plaintiffs-Appellants,

v.

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, POLICE COMMISSIONER RAYMOND W. KELLY, of the New York City Police Department,

Defendants-Appellees.

Corrected Order
Docket No. 08-5250-cv

Appellants Patrick Lynch, Patrolmen's Benevolent Association of the City of New York, Inc. having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the

Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe, Clerk

APPENDIX D

INTERIM ORDER

SUBJECT:	**ALCOHOL TESTING FOR UNIFORMED MEMBERS OF THE SERVICE INVOLVED IN FIREARMS DISCHARGES RESULTING IN INJURY TO OR DEATH OF A PERSON**	
DATE ISSUED:	REFERENCE:	NUMBER:
09-30-07	****P.G. 212 SERIES**	**52**

1. In an effort to ensure the highest levels of integrity at the scene of firearms discharges, all uniformed members of the service involved in firearms discharges, which result in injury to or death of a person, will be subject to Department administered alcohol testing.

2. Accordingly, when a uniformed member of the service, on or off duty, is involved in a firearms discharge within New York City which results in injury to or death of a person, the following procedure will be complied with:

PURPOSE To ensure the highest levels of integrity at the scene of police involved firearms discharges which result in injury to or death of a person, on or off duty, within New York City.

PROCEDURE When involved in, or responding to the scene of a police involved firearms discharge which results in in-

jury to or death of a person, on or off duty, within New York City:

UNIFORMED MEMBER OF THE SERVICE	1.	Request immediate response of patrol supervisor.
	2.	Comply with the provisions of P.G. 212-29, *"Firearms Discharge by Uniformed Members of the Service."*
PATROL SUPERVISOR	3.	Notify Operations Unit of shooting, immediately, and request response of Internal Affairs Duty Captain, Internal Affairs personnel and the Patrol Services Bureau Duty Inspector and Duty Captain.
DUTY CAPTAIN/ INSPECTOR	4.	Inform uniformed member(s) of the service who discharged their firearm that they will be subject to alcohol testing.
	5.	Ensure involved member(s) of the service remain on the scene when feasible and consistent with safety (i.e., hospitalization not immediately required); pending arrival of Internal Affairs Bureau personnel assigned to administer alcohol test.
	6.	Notify JAB Command Center of location of involved member(s) of the service if they are removed from location of firearms discharge.

IAB COMMAND CENTER

7. Notify assigned IAB personnel and the JAB Duty Captain of any pertinent information including any change of location of involved member(s) of the service.

INTERNAL AFFAIRS BUREAU DUTY CAPTAIN

8. Respond to location and confer with Duty Captain/Inspector on scene.

9. Advise the subject member that he or she may be tested by a number of different means, such as the PBT device and the Intoxilyzer.

10. Conduct alcohol test, using a PBT (portable breathalyzer test) device in a private setting, on uniformed member(s) of the service who discharged a firearm.

    a. Conduct the testing process in a private setting (e.g., Nearest Department facility, Department auto being used by the supervisor concerned) in a dignified, respectful fashion.

11. If the reading on the PBT device is less than .08, no further testing is required at this time.

12. If the reading on the PBT de-

vice is .08 or greater, which according to Section 1192 of the Vehicle and Traffic Law of the State of New York is indicative of intoxication, immediately notify Highway I.D.T.U. to respond to the IAB testing location to test the subject member using the Intoxilyzer that is maintained at the IAB facility. (It should be emphasized that the Intoxilyzer test at the IAB facility will be conducted by an I.D.T.U. technician.)

a. Member(s) involved will be transported to the LAB testing facility by IAB personnel.

b. A Highway District supervisor must be present during all phases of the testing procechue.

13. In the event that alternate arrangements must be made, the Intoxilyzer test will be conducted at the closest I.D.T.U. facility.

a. Member(s) involved will be transported to the I.D.T.U. testing facility by I.A.B. personnel.

b. A Highway District supervisor must be present

during all phases of the testing procedure.

NOTE *The I.D.T.U. technician will utilize a specially developed form entitled* ***Ordered Breath Test Instruction Sheet*** *to interview the subject member(s), and a specially developed checklist entitled* ***Intoicilyzer Operational Checklist*** *to conduct the test, The entire Intoxilyzer testing process, including the reading of the test results, will be videotaped by another member of the Highway District. In cases where there is an Intoxilyzer reading of .08 or greater, a copy of the videotape will be provided to the I.A.B. Duty Captain concerned, who will follow all applicable Departmental procedures to safeguard the tape for evidentiary purposes.*

INTERNAL AFFAIRS BUREAU DUTY CAPTAIN

14. In order to determine fitness for duty, record and then take into account the Intoxilyzer reading, the PBT reading, and any other related indicia of intoxication, as indicated in Appendix "A".

a. If the member is apparently unfit for duty, be guided by the procedures contained in E.G. 206-12, *"Removal of Firearms from Intoxicated Uniformed Member of the Service"* and other appropriate Department

procedures.

NOTE *If the subject member is determined to be unfit for duty, the IAB Command Center will be notified at (212) 741-8401 and a log number will be obtained.*

ADDITIONAL DATA

Members of the service are reminded of the contents of Patrol Guide procedures 203-04, "Fitness For Duty" and 204-08, "Firearms — General Regulations" as they relate to the use of alcohol and the possession of firearms while off duty.

Members should be aware that it would be prudent not to ingest alcoholic beverages up to four (4) hours prior to the commencement of their tour of duty.

RELATED PROCEDURES

Firearms Discharge by Uniformed Members of the Service (P.G. 212-29) Removal of Firearms from Intoxicated Uniformed Member of the Service (P.G. 206-12)

3. Any provisions of the Department Manual or any other Department directive in conflict with the contents of this order are suspended.

BY DIRECTION OF THE POLICE COMMISSIONER

DISTRIBUTION

All Commands

APPENDIX "A"
INDICIA OF INTOXICATION

Face to face observation and interaction with the subject member allows the supervisor concerned to use his or her senses to obtain "evidence" of alcohol intoxication:

* The sense of sight
* The sense of hearing
* The sense of smell

SIGHT

* Bloodshot eyes
* Flushed face
* Soiled, mussed, disarrayed clothing
* Fumbling (e.g., dropping paperwork, keys etc.)
* The presence of alcohol containers
* Physical coordination (e.g., swaying, staggering, unsteady, falling, wobbling, sagging knees, using a wall or furniture as a prop)
* Unusual actions (e.g., hiccupping, belching, vomiting, fighting, sleepy, urinating)

HEARING

* Slurred speech
* Admission of drinking
* Inconsistent responses
* Incoherent

* Abusive language, profanity
* Antagonistic
* Unusual statements

SMELL

* Odor of alcohol on breath
* "Cover Up" odors (e.g., breath spray, mints)
* Open alcoholic beverages
* Unusual odors

NOTE: These traits are illustrative; this is not meant to be a complete list of indicia.

APPENDIX E

Excerpts from the oral argument before the

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Lynch v. City of New York

November 18, 2009

* * * *

Ms. Gordon:

Good morning, Your Honors. My name is Jane Gordon on behalf of Appellees.

* * * *

COURT:

Was there evidence below of particular instances of an officer discharging a gun and injuring or killing someone while the officer was impaired because of alcohol use?

Ms. Gordon:

There was Your Honor. There have been suicides that have been connected to alcohol use.

COURT:

No, no, no. Lets take it to the case to the specific case —

COURT:

— This, this order that's at issue requires a breathalyzer —

Ms. Gordon:

That's right.

COURT:

— when there's a discharge of a weapon —

Ms. Gordon:

That injures another individual —

COURT:

- - that injures someone —

Ms. Gordon:

— Yes.

COURT:

— Prior to adoption of the order by the Police Commissioner, was there evidence before him, and was that evidence present in the record below that such things occurred and hence, the order was necessary to deal with it?

Ms. Gordon:

We did not have that evidence, Your Honor, because we were not permitted to breathalyze the officers in shooting situations. So, the evidence did not exist.

COURT:

But, was there evidence of such instances which failed to be reviewed because of breathalyzer was not required?

Ms. Gordon:

I don't believe it's in the record, Your Honor. No. however, the fact that we do not have those instances does not mean that it is a irresponsible initiative by the Police Department. I also would like to just take a minute, if I may go —

COURT:

So, a regulation as created on a what-if basis?

Ms. Gordon:

Yes, Your Honor, because of the alcohol issues in the department that we recognized because there are alcohol problems. You did ask my advisory about instances that have occurred, and in fact, a police officer tested positive after a breathalyzer after the — after — if I may go outside the record because you did ask. He was off-duty and he had come out of a bar and he came upon a shooting incident and he took down the shooter, or he shot at the shooter.

He was breathlyzed in the hospital and he was one point over. He was .09. He was not disciplined. It was found that his actions were appropriate, even though he was over the limit. He did not suffer consequences because of this. The mayor, in fact, commended him for his actions.

COURT:

Could we go back to the state of the record which is where we began when Judge Kate —

Ms. Gordon:

Yes —

COURT:

— asked her a question? What we have here is a denial of Plaintiffs Motion for Preliminary Injunction. Is it your view that we are in a position on the basis of this record to rule that the breathalyzer policy is reasonable under the three factor balancing test of the Special Needs Doctrine or is the record not yet fully developed for, for any court to, to make that kind of assessment?

Ms. Gordon:

Well, we move for summary judgment. So, we obviously believe that the record was sufficient to make that determination.

COURT:

And that was denied?

Ms. Gordon:

Yes.

COURT:

But, but there was nevertheless a decision, was there not on the — a judgment based on law that the breathalyzer policy is reasonable?

Ms. Gordon:

Yes.

COURT:

You believe there's enough of an evidentiary record to support that legal determination?

Ms. Gordon:

Absolutely. We do.

COURT:

So that despite the denial of summary judgment, the same data which you gave the court was utilized by the court to deny the Preliminary Injunction motion?

Ms. Gordon:

Yes.

COURT:

So, if we affirm the District Court's denial of Plaintiff's Motion for a Preliminary Injunction, the case is over, is it not? Or does — or is — since there has not been a consolidation of — with the trial on the merits, I suppose it's arguable that somehow their case continues in the District Court so that a more complete record can be made and then perhaps the plaintiff in theory could prevail on that more complete record.

Ms. Gordon:

In theory, and then there are other parties not on this appeal also who are still in the District Court. So, I'm not sure that all the loose ends would be tied up quite frankly. It would be nice if they could be, but I'm, I'm not sure that that's what would happen. I know that from our point of view, I'm not sure that we have anything more to say on this than what we've said below.

I don't want to waive an opportunity if there's gonna be discovery. I'm not suggesting that, but I think that we made our showing when we for something —

COURT:

So, you and Mr. Puccio agree that that the evidentiary record is as complete as it's likely to get?

Ms. Gordon:

As I certainly as complete as it's probably gonna get from my point of view, yes?

COURT:

So, to go full record, that suggests that we — that were we to affirm the denial of the Motion for Preliminary Injunction, that could be the end of the case?

Ms. Gordon:

I would hope so. And, if there's no further questions, I'm happy to rest on my brief.

COURT:

Mr. Puccio, you've reserved some time.

Mr. Puccio:

I did, but I don't know that I have much else to add. I'm now informed there's one — there's

COURT:

But you would agree — you would agree with —

Mr. Puccio:

— I, I certainly —

COURT:

— That final colloquy with opposing counsel that the record is about as complete as it's likely to be?

Mr. Puccio:

— I, I certainly do, Your Honor. I mean, I think I said that earlier. I mean you're not going to get any more out of this record, and I guess with the minute I have left, I should just say —

COURT:

— but to put it another way, in effect, Judge Daniels might have entered a permanent injunction and we'd be in the same spot?

Mr. Puccio:

That's correct. I mean, what we'll have — on the record below we have no instance that's covered by this order, of a historical instance in which a police officer was found to have had alcohol in his system when he discharged the weapon — Zero. I'm told now outside the record, there's one. One out of 35000 police officers. You can take out all those Supreme Court decisions and your own decisions and see if any situation is even remotely close to this one. There were none. And, if the reasons on page 34 ever came up here next year, you'd still have protecting the integrity of the NYPD, protecting the safety, all noble things. Protecting the safety of the public, deterring alcohol. By the way, there were about 50 procedures in place to deter alcohol before this, and they're in the briefs and we go into them.

And, finally assuring the public that one of the most important daunting powers of the police, the power to apply a deadly force when necessary is not being abused, the public is not out there thinking that's being abused. I mean, this is a press release because of a community pressure, because of a tragic, and no one is belittling what happened — a tragic

event caused the community pressure to issue something — okay, a breathalyzer. It makes no sense. It makes no sense at all on this record.

Thank you very much.

COURT:

Thanks very much. We'll reserve decision and we are adjourned.

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No. 10-97

Supreme Court, U.S.
FILED
SEP 17 2010
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK J. LYNCH AND THE PATROLMAN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

-v-

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, AND POLICE COMMISSIONER RAYMOND W. KELLY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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*Counsel of Record

QUESTIONS PRESENTED

Where petitioners have taken inconsistent positions on their need for additional discovery, and where neither of the lower courts has reached the merits of the issue petitioners' propose for this Court's review, should this Court nevertheless grant this petition?

If so, where the evidence presented to the District Court demonstrated that respondents imposed the mandatory breathalyzer tests at issue primarily to ensure a sober police force, thereby advancing public safety and the integrity and safety of the force, and where the primary purpose is not to generate evidence for law enforcement purposes, was there a "special need" for that initiative, and did the Second Circuit Court of Appeals correctly affirm the District Court's denial of petitioners' motion for a preliminary injunction?

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No. 10-97

IN THE
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PATRICK J. LYNCH AND THE PATROLMAN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

-v-

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, AND POLICE COMMISSIONER RAYMOND W. KELLY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

COUNTER-STATEMENT OF THE CASE

The New York City Police Department ("NYPD") has approximately 35,000 uniformed members of the service, including officers in all ranks, from Police Officer to Chief (A64, ¶3).[1] All of those officers are empowered to make arrests (*Id.*).

[1] Unless otherwise indicated, parenthetical references refer to pages in the Joint Appendix in the Court of Appeals.

Most are required to carry handguns and are authorized to use them if that becomes necessary in the course of the officer's duties (*Id.*).

A. Monitoring alcohol use by NYPD officers.

Due to the responsibilities and powers vested in each NYPD officer, the NYPD closely regulates and monitors its officers (A64, ¶4). Uniformed members are required to be fit for duty 24 hours a day, except when on sick report (A64, ¶6). To the extent that it renders them unfit for duty, they are not permitted to drink alcohol (A64-65, ¶¶7-10).

The Department considers drinking on the job to be a grave dereliction of duty. Any uniformed member who causes physical injury to another person while operating a motor vehicle, and is determined to be unfit for duty due to the consumption of alcohol, will ordinarily be terminated (A65, ¶8). At the very least, that officer will be placed on dismissal probation, which means that he or she can be terminated during the probationary period without a hearing or further process (*Id.*, at ¶9).

Any officer placed on dismissal probation under the foregoing circumstances will be subject to breathalyzer testing while on duty (A65, ¶10). Under that procedure, a breathalyzer test above .02 is cause for a further, more sensitive test, on an "Intoxilyzer" (A65, ¶10). If the officer tests above .04, the officer is considered unfit for duty (*Id.*).

Any officer who may be experiencing trouble with alcohol has access to confidential NYPD assistance units, including the Counseling Service

Unit (A65, ¶11). The NYPD's goal is "early detection and referral of personnel for evaluation and treatment before drinking causes problems in work performance or worse" (*Id.*)(emphasis in original).

If an off-duty officer consumes alcohol, he or she is required to take precautions to ensure that s/he does not become intoxicated while in possession of a firearm (A66, ¶12). For example, the officer can place the firearm in a locked safety box (*Id.*, at ¶13).

B. NYPD officers also routinely undergo testing for substance abuse.

During their careers, NYPD officers are also periodically subject to drug testing (A66, ¶14). For example, the officer is drug tested at the beginning and end of his or her probationary period (*Id.*). Where an officer applies for various specialty assignments, part of the screening will involve a drug test (*Id.*, at ¶15). Drug tests may also be administered if there is reasonable suspicion that the officer has ingested a controlled substance (A66, ¶16).

All NYPD officers, of all ranks, are also subject to random drug testing (A66, ¶17). NYPD officers are selected at random, and without reasonable suspicion, to provide samples for analysis for controlled substances (*Id.*).

Drug testing has a variety of goals (A66, ¶18). It protects the public from officers who may not be completely in control of themselves due to the use of controlled substances (*Id.*). Drug testing

also protects the lives of fellow NYPD officers, who rely on each other in life-threatening situations, which can arise suddenly, without warning, and which may require good judgment under the most difficult of circumstances (*Id.*). Drug testing also reinforces the public's confidence in the Department and the public's willingness to cooperate fully with the Department (*Id.*). That confidence and cooperation are essential to the mission of the NYPD (*Id.*).

C. Evidence of alcohol-related incidents in the Department.

The NYPD has long recognized that some NYPD officers may have problems with alcohol consumption (A67, ¶19). The NYPD maintains a Counseling Unit, which is concerned with possible alcohol abuse, and officers may attend the Counseling Unit anonymously, that is, without telling any member of the NYPD (*Id.*). Under certain circumstances, NYPD officers may also be directed to the Counseling Unit for an interview (*Id.*, at ¶20).

From 2005 to 2007, approximately 600 officers were interviewed by the Counseling Unit (A62, ¶9). That number included 380 officers who were new to the unit (*Id.*).

Unfortunately, the NYPD has also experienced a problem with officers being arrested for Driving While Intoxicated ("DWI") (A67, ¶21). In 2005, 10 off-duty officers were arrested for alleged DWI (*Id.*). In 2006, 16 off-duty officers were arrested for DWI (*Id.*). As of November 2007, 12

NYPD off-duty officers were arrested for alleged DWI (*Id.*).

Tragically, the NYPD has also experienced the suicide of a number of officers (A67, ¶22). From 2005-07 there were ten suicides (*Id.*). In four of those suicides, there was either alcohol present at the scene or a medical examiner's report found alcohol in the body of the deceased officer (*Id.*).

These statistics show that, on a consistent basis, NYPD officers with alcohol problems have been involved in illegal or life-threatening behaviors (A67, ¶23). The risk to the public and to fellow officers from this is real, and the NYPD has responded by, *inter alia*, providing counseling services, requiring that officers be fit for duty at all times, and requiring that a NYPD officer who is intoxicated be relieved of his or her weapon (*Id.*).

D. Firearms discharges by NYPD officers.

According to NYPD records, in 2004 there were 111 occasions, other than on the firing range, when an NYPD officer discharged his or her firearm (A68, ¶25). This figure includes on- and off-duty firings and incidents in which no one was injured and no property damaged (*Id.*). In 2005, the number of firearms discharges was 130; in 2006, the number was 119; and as of November 2007, 104 firearms discharges had occurred (*Id.*).

Every discharge of a firearm by a NYPD officer, whether on- or off-duty, that is not on a firearms range, is investigated under a firearms discharge procedure found in the NYPD Patrol Guide (A68, ¶26). Following the discharge of a

firearm, a variety of superior officers and investigators will respond to the scene of the shooting, regardless of whether an injury has resulted from the shooting (*Id.*, at ¶27). Those responding will almost always include the Patrol Borough's "Shooting Team Leader," who is a Captain or above and who leads the initial investigation of any shooting (*Id.*).

A ranking IAB officer, as well as a superior officer from the Patrol Borough in the command of occurrence will also respond, unless the incident occurs outside the City of New York (A69, ¶28). A Chief or an Inspector who is on duty specifically to supervise such investigations, called the Duty Inspector or the Duty Chief, will also respond to the scene and supervise the investigation into the firearms discharge (*Id.*, at ¶29). The office of the District Attorney for the borough where the shooting occurred will be notified, and that office may also decide to have personnel respond to the shooting (*Id.*, at ¶30). A community affairs officer will also respond (*Id.*, at ¶31).

The NYPD also maintains a Trauma Counseling Program that can offer counseling to any officer involved in a firearms discharge and who may be traumatized by the experience (A69, ¶32). The officer may also use, or be sent to, the NYPD's Psychological Services Division for evaluation (*Id.*).

E. Investigation procedures for shootings.

Additionally, and in recognition of the fact that criminal charges may result against the NYPD officer or a civilian, all shootings are treated as part

of a possible criminal investigation (A69, ¶33). Of course, whether criminal charges will result cannot be determined until the investigation is completed, and that is why the NYPD treats all firearms discharges as an investigation into a possibly criminal matter (*Id.*). Therefore, the Crime Scene Unit often responds to the scene of a shooting (*Id.*).

All shooting investigations include an initial report prepared by the Shooting Team Leader (A70, ¶34). That is followed by a final report completed by a commanding officer, a review by a Borough Firearms Discharge Advisory Board, and a final review by the Chief of Department's Firearms Discharge Review Board (*Id.*).

The initial report will contain a narrative of the shooting based on the information obtained in the preliminary investigation (A70, ¶35). Any officer who fired a weapon will have that weapon examined and inspected (*Id.*, at ¶36). For example, the number of live and spent shells will be recorded (*Id.*). Any ammunition possessed by the officer will be taken for safekeeping (*Id.*).

The initial report may also contain a preliminary evaluation of whether the discharge was within NYPD guidelines, and a recommendation of whether corrective action or disciplinary proceedings should be initiated. The report will also include information concerning any arrests made, and will record the activities of the Crime Scene Unit, which often recovers and takes custody over physical evidence found at the scene (A70, ¶¶37-38). The Crime Scene Unit may also take photographs to record the physical layout of the scene (*Id.*).

Within 90 days of the shooting, or as soon thereafter as possible, the Commanding Officer of the Borough Investigation Unit or the precinct of occurrence prepares a follow up report. This report includes findings and recommendations, the Medical Examiner's report (if applicable), the ballistics report, a synopsis of the police officer's statements, and, if applicable, District Attorney or grand jury findings as well as IAB findings (A70, ¶¶37-38).

A Borough Firearms Discharge Advisory Board reviews the incident and can sustain or alter findings and recommendations that were made earlier in the investigation (A71, ¶40). Typically, that Board has seven members, including one officer who is of the same rank as the officer who discharged the firearm (*Id.*). The remaining six members will be at or above the rank of Captain and will include the Commander of the Patrol Borough (*Id.*). The Board then prepares a report to the Chief of Department's Firearms Discharge Review Board that includes findings and recommendations (A71, ¶41).

The NYPD's Firearms Discharge Review Board is chaired by the Chief of Department and includes the Deputy Commissioner for Training, the Deputy Commissioner for Legal Matters, Chief of Personnel, an Operational Bureau Chief and the Commanding Officer of the Firearms and Tactics Section (A71, ¶42).

Any officer who discharges his firearm, whether on-duty or off-duty, and regardless of whether the shooting is justified or not, will attend an NYPD tactics review session (A71, ¶43).

The NYPD follows the foregoing protocols in all instances where a member of the service discharges his or her firearm, whether on- or off-duty, and whether or not there has been an injury to a person resulting from the discharge (A72, ¶44). Given the seriousness of firearms discharges, the NYPD goes to great lengths to investigate the event (A72, ¶45). The NYPD treats the scene of a shooting as a crime scene to protect the integrity of the evidence, and to assure the public and the NYPD's own officers that the truth of the shooting will be brought out and appropriate actions taken (*Id.*).

Appropriate action may include additional training of one or more officers, disciplinary action against the officer or, in relatively rare circumstances, a criminal prosecution (A72, ¶46).

F. The Sean Bell shooting.

On November 26, 2006, an undercover operation at a Queens nightclub, conducted by the NYPD's Organized Crime Control Bureau, ended in the shooting death of civilian Sean Bell, and the wounding of two of his companions, as the result of shots fired by NYPD officers (A72, ¶47). Three of those officers were indicted by a grand jury (A72, ¶47).

Following the incident, elected officials, the media, and community leaders raised a number of questions about various aspects of NYPD undercover operations (A72, ¶48). Against this backdrop, the Police Commissioner convened a high-ranking committee to review undercover

operations procedures and make recommendations for improvements (A73, ¶50).

On June 18, 2007, the Police Commissioner announced 19 recommendations made by the Committee for Review of Undercover Procedures (A73, ¶52). The special panel made recommendations to improve how undercover officers are recruited, trained, supervised, and retained (*Id.*).

In addition, the special panel recommended mandatory breathalyzer tests of all NYPD officers, on-duty and off-duty, whose firearms discharge results in injury or death (A73, ¶52). All 19 recommendations were publicly disseminated and announced prior to the completion of the Committee's report so that implementation of those recommendations would not be delayed (*Id.*).

G.. The implementation of IO 52.

On September 30, 2007, the Police Commissioner issued Interim Order ("IO") 52, entitled "Alcohol Testing For Uniformed Members of the Service Involved in Firearms Discharges Resulting In Injury To Or Death Of A Person" (A74, ¶54; 79). As stated in IO 52, the order's purpose is (79):

> To ensure the highest levels of integrity at the scene of police involved firearms discharges which results in injury to or death of a person, or off duty, within New York City.

IO 52 applies only if (1) there is a shooting; (2) in New York City; (3) by a uniformed member of the NYPD; (4) resulting in injury or death; (5) to a person (A74, ¶56). IO 52 is in addition to, not in place of, the investigation of firearms discharges described above (A74, ¶57).

The procedures of IO 52 are applicable even when there is little or no risk of criminal prosecution, as long as there has been a shooting by an NYPD officer in New York City that has injured a person (A74, ¶58). For example, where an officer accidentally discharges his weapon injuring himself, there is generally very little risk of criminal prosecution, and yet IO 52 is to be followed in that situation (A74, ¶58).

To be effective, a breathalyzer test must be administered very soon after the shooting (A75, ¶59). Otherwise, it will not detect alcohol (*Id.*). In short, accurate information will be lost if not collected and preserved quickly (*Id.*). Therefore, IO 52 requires that the test be administered at the scene, but also in a way that maximizes the privacy of the officer to whom the test is administered (*Id.*).

The NYPD has the necessary experience in administering breathalyzer tests, especially in the NYPD's Highway Patrol Unit, which administers breathalyzers to civilians who are suspected of driving while intoxicated (A75, ¶60). Procedures in IO 52 will take advantage of this expertise to ensure that the test is administered properly so that the results are reliable (A75, ¶61).

Under the New York State Vehicle and Traffic Law ("VTL"), an individual cannot drive

while under the influence of alcohol, as evidenced by a score of .08 on a breathalyzer test (A75, ¶62). IO 52 incorporates the same standard (*Id.*).

If the officer scores less than a .08, no further testing is done (A75, ¶63). If the officer scores a .08 or greater on the breathalyzer, then further testing will be done to determine whether the officer is intoxicated (A75, ¶64).

Any officer scoring greater than .08 will be tested on a more sensitive instrument, the Intoxilyzer (A76, ¶65). That test will be administered by the Highway Patrol District's Intoxicated Driver Testing Unit, which has experience in administering that test (*Id.*).

The results of the alcohol testing may result in discipline of the officer who has been involved in a shooting while under the influence of alcohol (A76, ¶66). The results may also be used in the criminal investigation of the shooting (*Id.*).

For all of the forgoing reasons, IO 52 also advises members not to ingest alcoholic beverages up to four hours prior to the commencement of their tour of duty (A76, ¶67).

H. IO 52 is not a law enforcement initiative.

The NYPD recognizes that some of its officers may be experiencing problems with alcohol, and that may render them unfit for duty (A76, ¶68). The alcohol problem may also surface in a more extreme manner, such as a DWI arrest or in suicide (*Id.*). The NYPD has an obligation to the public and to fellow NYPD officers to require fitness for duty and the removal of weapons of an

intoxicated officer (*Id.*). The NYPD also recognizes its duty to the officer by providing counseling services on a confidential basis and encouraging the use of those services (*Id.*).

Public confidence in the NYPD is critical to the accomplishment of the NYPD's mission of preserving and protecting the health, safety and welfare of the public (A76, ¶69). The possibility that an NYPD officer might be involved in a shooting while under the influence of alcohol undermines that trust and risks the integrity of the NYPD (*Id.*).

IO 52 serves the NYPD's interests in (1) protecting the integrity of the NYPD; (2) protecting the safety of the public and NYPD officers; (3) deterring alcohol intoxication by NYPD officers who are carrying firearms; and (4) assuring the public that one of the most important and daunting powers of the police -- the power to use deadly force when necessary -- is not being abused or used by officers who are under the influence of alcohol (A77, ¶70).

I. This Action.

In October 2007, petitioners challenged IO 52 as an unreasonable search and seizure under the Fourth Amendment (A25-26). Petitioners sought, and respondents opposed, the issuance of a temporary restraining order (A31-42), which the District Court denied (A46). They also sought a preliminary injunction (A47-58).

The following month, and detailing all the foregoing history, respondents opposed the issuance

of an injunction and cross-moved to dismiss the complaint or, alternatively, for summary judgment (A59-121). The District Court heard argument on those motions on November 20, 2007 (A143-217).[2]

The District Court's Order[3]

In denying petitioners' motion for a preliminary injunction, the District Court determined that, although petitioners had "adequately pled their claims to withstand a motion to dismiss," those allegations were insufficient to sustain injunctive relief (A223).

The District Court found that petitioners' Fourth Amendment claim was unlikely to succeed on the merits because immediate alcohol testing fell within the "special needs" exception where, as here, there is a "legitimate public safety concern" (A225). Citing to *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 621 (1989), the Court pointed to the government's interest in ensuring the public

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[2] There are two additional sets of plaintiffs who participated in the District Court motion practice but did not participate in the appeal: unions representing the ranks of detective, sergeant, and lieutenant (the "Palladino" plaintiffs) and the Captains' Endowment Association (the "Richter" plaintiffs). All the plaintiffs moved for a preliminary injunction, and the Palladino plaintiffs also cross-moved for summary judgment (A218-219).

[3] *Palladino v. City of New York*, 2008 U.S. Dist. Lexis 86757 (SDNY Sept. 30, 2008).

safety, which depends on prohibiting the use of alcohol or drugs "on duty, or while subject to being called for duty." *Id.*

The Court also found that petitioners had failed to show why that special need analysis was not applicable here (A227). Pointing out that a sober police force advances public safety and that IO 52 encourages sobriety, the Court reasoned that respondents have "a substantial interest in the safety of its citizens, visitors, and the police department" (*Id.*).

Significantly, the Court found that petitioners had failed to show that IO 52 is primarily concerned with law enforcement, a threshold showing necessary to defeat the application of the special need analysis (A227). Indeed, the Court noted, "there has been no evidence proffered that alcohol monitoring of police officers pursuant to the regulation has been used primarily for any other purpose than deterring alcohol consumption and increasing public confidence in police force action following a shooting" (Id.). Nor, the Court noted, have petitioners claimed the regulation is pretextual (A228).

The Court denied the cross-motions for summary judgment as "premature," reasoning that both the Palladino plaintiffs and respondents had "failed to make the requisite showing that no issue of material fact exists" (A222, n.4).

The Order of the Second Circuit Court of Appeals

The Second Circuit affirmed, finding that the District Court did not abuse its discretion in denying petitioners' motion for a preliminary injunction. In doing so, the Second Circuit found, based on the record, that the NYPD's breathalyzer policy "has multiple purposes," including one "directly related to the NYPD's role as an investigator of crimes" but others that are "related to 'special needs' apart from the NYPD's general interest in crime control." *Lynch v. City of New York,* 589 F.3d 94, 100 (2d Cir. 2009). After reviewing the NYPD's protocols, the Court reasoned that there are "multiple purposes of the breathalyzer policy -- some unrelated to crime control and one directly related to crime control -- and the critical question in determining whether the special needs doctrine applies is whether the NYPD's general interest in crime control is the policy's 'primary purpose.'" *Id.*, at 102.

In light of the District Court's finding that petitioners had "'proferred no evidence that [Interim Order] 52 is a regulation primarily concerned with law enforcement,' nor have plaintiffs 'shown that a primary purpose of the regulation is to generate evidence for prosecution," the Court held that the District Court "did not err in reaching that conclusion." 589 F.3d, at 102. The Court also determined that the District Court correctly applied the special needs doctrine to evaluate the IO 52, because "the mere fact that crime control is one purpose -- but not the primary

purpose -- of a program of searches does not bar the application of the special needs doctrine." *Id.*, at 94. That is because, the Court reasoned, "even if crime control is one purpose of a program of searches, the program may nevertheless be reasonable under the special needs doctrine so long as crime control is not the program's primary purpose." *Id.*, at 102.

The Court then found that IO 52 is reasonable under the three-factor special needs balancing test. As to the first factor -- the nature of the privacy interest involved -- the Court, relying on *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989), pointed out that the police have a diminished expectation of privacy when it comes to carrying and using firearms. 589 F.3d, at 103. Recounting the many times when NYPD officers are subject to random testing, the Court noted, "NYPD officers are already subject to drug screening as part of their employment in the NYPD, and although breathalyzer testing may be intrusive in some workplaces, the 'operational realities of the workplace' for NYPD officers 'render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts.'" *Id.*

As to the second factor to be considered -- the character and degree of the governmental intrusion – the Court noted that "NYPD officers who discharge their weapons are, under separate, preexisting NYPD policies, already subject to close scrutiny in the form of an administrative investigation." 589 F.3d, 103-104.

As a result, the Court reasoned, the breathalyzer test is not an "unexpected intrusion

on privacy." 589 F.3d, 103, *citing Von Raab,* 489 US, at 672 n.2. Additionally, the Court found that the policy does not carry "the grave potential" for arbitrary violations of privacy because it is "applied uniformly in every situation in which an NYPD officer causes injury by firing his or her gun." *Id.*, 103-104.

As for the third factor -- the nature and immediacy of the government's needs and the efficacy of its policy in addressing those needs – the Court found the government's to be "manifest," and the policy "straightforwardly addresses those needs." 589 F.3d, 104. The Court, citing *Von Raab*, 489 U.S. at 670 and *Skinner*, 489 U.S., at 628, reasoned that "[l]ike the Customs Service employees in *Von Raab*, NYPD officers 'who may use deadly force plainly 'discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.'" As a result, the Court found that the challenged policy is "vital to public safety," and that the NYPD has a substantial interest in both detecting and disciplining officers who violate those policies and in deterring its officers from using their firearms while intoxicated. 589 F.3d, 104. Indeed, the Court noted, "[b]y quickly and unequivocally determining whether alcohol was involved in an NYPD officer's use of his or her firearm, the breathalyzer policy will assist the NYPD in disciplining officers who use their firearms while intoxicated and will provide an incentive to officers to stow their firearms before drinking alcohol." *Id.*.

The Court then recognized that "the NYPD's reputation in the eyes of the public is directly tied

to its effectiveness as a police force." 589 F.3d, 104. To the extent the breathalyzer policy "improves the NYPD's public reputation," the Court found, "it furthers an important governmental interest." *Id.*

REASONS FOR DENYING THE PETITION

THE SECOND CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S ORDER DENYING PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION IS LEGALLY CORRECT AND DOES NOT CONFLICT IN A MEANINGFUL WAY WITH ANY DECISION OF THIS COURT, ANY LOWER COURT, OR OTHERWISE WARRANT FURTHER REVIEW BY THIS COURT.

Contrary to the argument petitioners urge in their petition, there is no important conflict among the Circuit Courts of Appeals or the state courts regarding the special needs doctrine, nor does this case raise any issues under this Court's opinion in *Skinner*. Rather, petitioners' contentions rest on a mischaracterization of the facts regarding the primary purpose of IO 52, as both lower courts correctly determined.

I. Having failed to move for summary judgment, and having opposed respondents' cross-motion for summary judgment with a claimed need for discovery, petitioners' request for a decision on the merits now is irreconcilable with their prior positions.

As a threshold matter, petitioners urge that this Court may dispose of this proposed interlocutory appeal on the merits because all

parties agree that the present record is sufficient for that purpose (Pet., at 10-11). They make that assertion even though they never moved for summary judgment, and despite the fact the District Court expressly denied cross-motions by both the respondents and the Palladino plaintiffs because, it found, neither had made the requisite showing that no material dispute of fact exists (A222, n.4).

And while petitioners now contend that this record is nevertheless sufficiently complete for a merits review, they opposed respondents' cross-motion for summary judgment specifically because they sought to take discovery "as to the actual, programmatic purpose of IO 52 and the extent, if any, to which IO 52 *in fact* serves the purposes advanced by the City as justifications for its suspicionless searches" (emphasis in original) (A138). In short, petitioners have expressed a consistent lack of consistency, depending on the procedural context, regarding whether the case is "sufficiently complete" for a merits review.

Not surprisingly, then, their representation to this Court, that "if the Court grants review and affirms, petitioners will dismiss their complaint" (Pet., at 11), does not foreclose yet another sea change regarding their need for discovery should this Court deny review and the matter is returned to the District Court.

Moreover, petitioners do not even ask the Court to review the propriety of the Second Circuit's affirmance of the District Court's denial of their motion for a preliminary injunction. Instead, petitioners ask the Court to address the merits of

its Fourth Amendment challenge, an issue that neither of the lower courts has had the opportunity to reach. Thus, the Court will not have the benefit of the lower courts' full consideration.

Although this Court certainly may review the merits of a case after appeal of an interlocutory judgment, the Court has generally declined to do so absent special circumstances. *See Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring)(denying a writ of certiorari because the petition "seeks our intervention before the litigation below has come to final judgment"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree.").

The Court's reluctance to grant review on the basis of an interlocutory order reflects its more general policy against disposing of actions prematurely or unnecessarily. *See American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893)("[M]any orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order . . . ."); *see also Rescue Army v. Mun. Court of Los Angeles*, 331 U.S. 549, 568 (1947)(reiterating that the Court "has followed a policy of strict necessity in disposing of constitutional issues" and that "perhaps the most effective implement for making the policy effective has been the certiorari jurisdiction conferred upon this Court by Congress").

Although the Court has made exceptions to this general rule against reviewing interlocutory judgments, those exceptions tend to be where, unlike here, there are fully developed legal issues "fundamental to the further conduct of the case." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945); *see, e.g., Yeager v. United States*, 129 S. Ct. 2360 (2009)(preclusion issues from a previous trial must be determined before the present action can continue); *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148 (1964)(unresolved preemption issues govern the outcome of the litigation); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)(jurisdictional issues must be settled before the case can proceed); *Land v. Dollar*, 330 U.S. 731 (1947)(necessary to determine whether the United States should have been the party to the suit). Here, however, there are no issues that need to be resolved by this Court before the District Court could render an opinion on the merits, and petitioners do not contend otherwise.

Thus, on this basis alone, the petition should be denied. Alternatively, the proposed issue for review is nit sufficiently compelling to warrant this Court's discretionary grant of *certiorari* review.

II. Petitioners ignore ample evidence of a special need for IO 52 in order to frame an issue worthy for this Court's review.

Petitioners' do not take issue with the Second Circuit's three-part analysis of the special needs doctrine, as the Court applied it to these facts. Instead, they once again contend that IO 52 is primarily intended to serve the ordinary needs of law enforcement (Pet., at 11-15). As both the

District Court (A227) and the Second Circuit (589 F.3d, 102) found, however, they are unlikely to prevail on that claim.

While the Fourth Amendment prohibits "unreasonable searches and seizures," the "special needs" doctrine permits searches without a warrant and without individualized suspicion. *See Cassidy v. Chertoff*, 471 F.3d 67, 74-75 (2d Cir. 2006) (reviewing cases); *see also Von Raab*, 489 U.S. 656; *Skinner*, 489 U.S. 602; *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006). Special needs searches are reasonable under the Constitution. *Id.*

As the Second Circuit noted, a "'program' or 'general scheme' of searches qualifies for treatment under the special needs doctrine only if the program's 'primary purpose' is not a 'general interest in crime control.'" 589 F.3d, 100. Here, respondents demonstrated that the primary purpose of IO 52 is public safety under circumstances where lethal force may be used, and personnel management, in that IO 52 (1) allows the NYPD to identify officers who endanger themselves and others by using their weapons while intoxicated, thus protecting the safety of the public as well as other NYPD officers; (2) serves as a deterrent to officers who may consider alcohol consumption while carrying their weapons; and (3) helps to build public confidence in the integrity of the police force (A77). As the Second Circuit correctly found, none of these objectives is related to crime control. 589 F.3d, 101.

Indeed, the NYPD's fundamental need for obedience among officers, and its consequent need to impose discipline for those who violate the

Department's rules and the law, necessitate such measures where, as here, officers carry weapons and are authorized to use deadly force. Officers must at all times be fit for duty, unless they are on authorized sick leave, and the drug testing the NYPD has long imposed on members of the service reflect the officer's continuing burden of readiness for the job and the good order and discipline needed for the police force. *Cf. United States v. Rendon*, 607 F.3d 982, 990-991 (4th Cir. 2010)(discussing special needs of the military).

Nor is it significant that one purpose of IO 52 is related to crime control, as the Second Circuit correctly reasoned. 589 F.3d, 102. Relying on this Court's decision in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court noted that "the special needs doctrine applies to any program of searches whose 'primary purpose' is a government interest other than crime control . . . and the mere fact that crime control is one purpose -- but not the primary purpose -- of a program of searches does not bar the application of the special needs doctrine." *Id.*.

In short, the government's asserted special need "must not be isomorphic with law enforcement needs, but rather go beyond them." *Cassidy*, 471 F.3d, at 81.

Given the foregoing, petitioners are simply wrong when they urge that this appeal poses a question reserved in *Skinner*, 489 U.S. 602 (Pet., at 11-12). As an initial matter, the NYPD stands in the exact same shoes as the private railroad in *Skinner*, because both are employers implementing measures to prevent accidents and casualties. And

just as in *Skinner*, the petitioners here do not seriously contend that IO 52 is a pretext to "enable law enforcement authorities to gather evidence of penal law violations." *Id.* Thus, the only question that the Court "left for another day" is "whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the . . . program." *Id.* Given that petitioners have no evidence whatsoever of pretext, much less a persuasive showing that IO 52 is pretextual, "the policy must be assessed in light of its obvious administrative purpose." *Id.*

Nor is there is something inherently suspect where, as here, test results may in some cases be used for law enforcement purposes (Pet., at 12-13). The issue is whether law enforcement is the *primary purpose* of the search, as even *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), on which petitioners so heavily rely (Pet., at 13-14), recognizes. In *Ferguson*, the decisive factor was that "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." *Id.*, at 83. *See also Dickerson v. Napolitano*, 604 F.3d 732, 750 (2d Cir. 2010)("To determine whether the 'special needs' of the government permit a search that would otherwise be impermissible under the Fourth Amendment, courts first examine whether the search serves as its immediate purpose an objective distinct from the ordinary evidence-gathering associated with

criminal investigations").[4]

Petitioners are equally misguided when they urge that the Second Circuit's opinion conflicts with *Ferguson* (Pet., at 15-22). In fact, the question posed in *Ferguson* was: "whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant." 532 U.S., 70. In *Ferguson*, unlike here, the "immediate" intent was "to prosecute women who tested positive for cocaine while pregnant," *id.*, at 71, and thus, "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." *Id.*, at 80.

Additionally, petitioners' reliance on *Ferguson's* "excessive entanglement" language is a red herring. We can all agree that the NYPD is a law enforcement agency, and that, long before IO 52 was ever implemented, the NYPD investigated whenever a member of the service was involved in a shooting. But the NYPD is also an employer responsible for enforcing necessarily strict rules governing, *inter alia*, the use of deadly force by its officers, and that makes NYPD "entanglement" a

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[4] Significantly, petitioners cannot identify even a single instance when an IO 52 breathalyzer test has been used for a law enforcement purpose. Indeed, as of August 8, 2010, there have been 133 breathalyzer tests pursuant to IO 52, and none has resulted in criminal charges.

fact of everyday life when an officer uses his or her weapon. However, the Department's role at the scene of a shooting does not inevitably trump its role as an employer, nor does it mean that every NYPD policy has, as "the central and indispensable feature . . . from its inception" a law enforcement purpose. *Ferguson*, 532 U.S., at 83.

Indeed, the *Ferguson* Court never ruled there was something inherently suspect where, as here, there may be an incidental law enforcement purpose. Rather, in referring to *New York v. Burger*, 482 U.S. 691 (1987), the Court recognized just the opposite. In *Burger*, the Court rejected a contention that a statute authorizing administrative inspections by the NYPD of closely regulated chop shops was in fact "designed to gather evidence to enable convictions under the penal laws" because the "discovery of evidence of other violations would have been merely incidental to the purposes of the administrative search." *Id.*, at n. 21. That same reasoning applies here, where the Department routinely monitors officers very closely, and where officers consequently have a greatly reduced expectation of privacy.

Petitioners urge that IO 52's law enforcement purpose necessarily trumps its other purposes because, according to petitioners, it is the "immediate objective" here (Pet., at 18-21), but that attempt to now discredit the unchallenged evidence in the record does not create an issue worthy of this Court's discretionary review. There is, moreover, nothing in this record to support that assertion other than petitioners' own "interpretation" of IO 52's primary purpose and their shuffling of the purposes for IO 52 that respondents set out in their

cross-motion. Certainly, that sleight of hand falls far short of showing that the purpose of IO 52 is ultimately indistinguishable from a general interest in crime control.

And while petitioners contend that IO 52 is, in practice, implemented too late to protect the public safety, meaning, after the shooting has occurred (Pet., at 21), that ignores the measure's deterrent effect. Thus far, that effect has been quite substantial, given that, after 133 breathalyzer tests, not a single officer has been found to have been impaired. That is exactly the result the Department hopes for, and is certainly not, at any rate, attributable to a law enforcement purpose.

Recognizing that their reading of *Ferguson*'s reach may be overstated, petitioners alternatively urge the Court to nevertheless grant review in order to "clarify whether significant law enforcement entanglement and purpose . . . precludes 'special needs' exemption" (Pet., at 22). That issue, however, is unpreserved for this Court's review. At any rate, given this Court's decision in *New York v. Burger*, 482 U.S. 691, there is no need for such a "clarification," particularly where, as here, the employer imposing the test is the NYPD itself.

In order to argue that there is "disarray" in the state courts regarding the special needs doctrine, petitioners rely on various state cases involving motorists and equally distinguishable local statutes (Pet., at 23-27). As none of those cases involve an administrative personnel initiative applied to employees who, like the officers here, have a diminished expectation of privacy, they are

inapposite, and this proposed interlocutory appeal is therefore ill-suited to resolve those myriad and factually distinct issues.

Petitioners concede that there is no conflict in the federal appellate courts but nevertheless urge there are analogous questions (Pet., at 27-29). However, the factual circumstances are not at all analogous. For example, in *Greene v. Camereta*, 588 F.3d 1011, 1030, n. 17 (9th Cir. 2009), the Court recognized that there were no exigent circumstances surrounding the questioning of the child, but here, the breathalyzer test will be meaningless if NYPD needs to first obtain a warrant (A75, ¶59). Likewise, in *Knox County Education Association v. Knox County Board of Education*, 158 F,3d 361 (6th Cir. 1998), where the Court never even reached the issue, the question was whether the police, acting in a purely law enforcement capacity, could breathalyzer school employees.

Most tellingly, petitioners ask this Court to exercise its *certiorari* review powers based on the wholly speculative "potential" reach of the Second Circuit's opinion (Pet., at 30). A preliminary determination of likelihood of success on the merits is ordinarily considered tentative and therefore has questionable value as precedent. At any rate, the application and issues involving of IO 52 are so fact-specific that the Second Circuit's decision has limited application outside these unique circumstances.

This record demonstrates that mandatory testing serves many important purposes beyond simply determining if a particular officer fired his

weapon while under the influence of alcohol. The goal is to deter officers from alcohol consumption by immediately testing every single time a person is injured or killed in a shooting by a member of the service. Mandatory testing also is the most reliable way to monitor officers and their use of firearms to make sure that no officer uses his or her weapon while impaired because of alcohol consumption.

Equally important, the NYPD should be able to assure the public that alcohol has not played a role in a shooting injury or death. Officers have been entrusted with the authority to use deadly force, and along with that power is a public expectation that it will be very carefully monitored.

Unfortunately, this record demonstrates that alcohol use by police officers is a serious, continuing problem that poses grave risk to the public and other officers. In less than three years, more than 600 officers were interviewed by the Department's Counseling Unit, including 380 new cases (A62, ¶9). During the same time period, 38 off-duty officers were picked up for DWI (A67, ¶21), and there were ten suicides, including four involving alcohol (*Id.*, at ¶22).

As the Second Circuit correctly determined, respondents defeated the motion for a preliminary injunction by demonstrating that IO 52 is minimally intrusive, advances the Department's need to make sure the official use of deadly force is not the result of alcohol abuse, and instills essential public confidence in the police force. That decision is legally correct, and does not conflict with any decision of this Court or of any other state or

federal courts, and it does not otherwise warrant further review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
September 17, 2010

Respectfully submitted,

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(3)

No. 10-97

In the Supreme Court of the United States

PATRICK J. LYNCH, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

v.

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, and POLICE COMMISSIONER RAYMOND W. KELLY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The question presented is whether the Fourth Amendment allows police investigators—without any ground for suspicion—to subject officers to breath-testing following a shooting, in part for the purpose of investigating the officers' potential criminal liability and obtaining evidence for possible criminal prosecutions. The court of appeals held that the "special needs" doctrine allows police investigators to conduct such suspicionless, nonconsensual body searches so long as the criminal investigative purpose is not the "primary" one. See Pet. App. 12a-13a. That decision cannot be reconciled with this Court's "essential point" in *Ferguson v. City of Charleston* that "extensive entanglement of law enforcement" in suspicionless substance testing, such as "[t]he fact that positive test results [are] turned over to the police," "cannot be justified by reference to [special] needs." 532 U.S. 67, 83-84 & n.20 (2001). As the Court emphasized, "[i]n other special needs cases" it had "tolerated suspension of the Fourth Amendment's warrant or probable-cause requirement in part because there was ***no law enforcement purpose*** behind the searches * * *, and there was ***little, if any, entanglement with law enforcement***." *Id.* at 79 n.15 (emphases added).

1. In stark contrast, respondents readily agree that the suspicionless search program at issue here, "IO-52," has ***both*** a "law enforcement purpose" ***and*** significant "entanglement with law enforcement." Specifically, they expressly concede that "one purpose of IO 52 is related to crime control" (Opp. 24); and dismissively acknowledge that "[w]e can all agree" that law enforcement is "entangled" in their program of suspicionless searches (Opp. 26).

Strangely, respondents attempt to brush off this conceded "entanglement of law enforcement" in supposedly "administrative" civil searches, and their collection of test results for possible use for "criminal prosecution[s]" (Opp. 9), as a "red herring" (Opp. 26). They reason that these features of their drug-testing program are inevitable and unremarkable given the NYPD's dual roles as employer and law enforcement agency. Opp. 26-27.

But there is nothing inevitable or unremarkable about them. Other drug testing programs for law-enforcement employees—and indeed all of respondents' own prior drug and alcohol testing programs—have managed to avoid such entanglement and purpose by either (1) requiring individualized grounds for suspicion or consent as a predicate to a post-incident search whose results will be considered for use in a criminal prosecution, and/or (2) limiting use of test results to employment purposes such as suspension or discharge. See, *e.g.*, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (upholding Customs Service drug-testing program in part because it mandated that "[t]est results may not be used in a criminal prosecution of the employee without the employee's consent"); Pet. 5-6 (detailing NYPD's own prior programs).

2. Respondents correctly note that the majority in *Ferguson*, unlike the court below, had found that law enforcement was the "primary" purpose of the suspicionless searches. Opp. 25. But they ignore the *Ferguson* majority's emphasis that its "essential point"—that "the extensive entanglement of law enforcement cannot be justified by reference to [special] needs"—was "the ***same*** as Justice Kennedy's" in his concurrence. 532 U.S. at 83 n.20 (emphasis added).

Justice Kennedy found the hospital drug-testing program unconstitutional notwithstanding his disagreement with the majority's holding that the "primary" purpose of the search was law enforcement. *Id.* at 86-89 (Kennedy, J., concurring). Justice Kennedy explained that "the search policy cannot be sustained" even though it "may well have served [special] needs" because "there was substantial law enforcement involvement in the policy from its inception." *Id.* at 88. So too here.

3. In any event, the court of appeals' decision conflicts not only with *Ferguson*'s prohibition against "extensive entanglement of law enforcement" but also with *Ferguson*'s holding that "primary purpose" must be assessed by reference to "immediate" rather than "ultimate" objectives. Respondents mischaracterize our challenge to the court of appeals' analysis of which of the City's purposes was "primary" as an "attempt to * * * discredit the unchallenged evidence" regarding the City's purposes in adopting IO-52. Opp. 27. But the petition did not challenge that evidence; rather, the disagreement is with the court of appeals' legal evaluation of that evidence, including most particularly its failure to apply *Ferguson*'s legal holding that ***immediate***, not ultimate, objective controls. See Pet. 18-21.

Applying that legal standard, the "primary purpose" of IO-52—that is, its "immediate objective" is law enforcement. Rather than address that point on the merits, respondents protest that analysis of the plain language of IO-52's statement of purpose (Pet. 19-20) as a means of discerning their policy's immediate objectives is a "sleight of hand" (Opp. 27-28). But the plain language of a policy is the first piece of "unchallenged" record evidence (Opp. 27) that courts

use to assess purpose. See, *e.g.*, *Ferguson*, 532 U.S. at 81-82 (turning first to the language of the drug-testing policy to assess its programmatic purpose). In any event, it is this ground of opposition that is a "red herring," as the petition showed that each of the purposes respondents proffered—not just those identified in IO-52's statement of purpose—is accomplished only through the more immediate objectives of criminal investigation and threatened prosecution. See Pet. 20-21.

On that score, respondents say nothing. Respondents do not appear to dispute that IO-52 achieves their stated purposes of deterring intoxicated police shootings and thereby protecting public safety (see Opp. 29-30) through the threat that any officers who test positive may be prosecuted. Indeed, they trumpet what they characterize as "the measure's deterrent effect." Opp. 28; accord Opp. 23, 30. But see *infra*, at 10. Respondents offer no distinction of the holding in *Ferguson* that where the threat of prosecution is used to achieve the ultimate civil objectives by deterring the targeted misconduct, the "immediate objective"—and hence the "primary purpose"—of the substance tests is "law enforcement." 532 U.S. at 83.

4. Moreover, even if the Court agrees with the court of appeals that the "primary purpose" of IO-52 is a legitimate civil objective, the case presents a key question arising in the wake of *Ferguson* precisely because the majority there did find a law-enforcement "primary purpose": whether significant—though not "primary"—law-enforcement purpose and entanglement precludes justification under the "special needs" exemption, as Justice Kennedy would have held, and the majority strongly sug-

gested but did not need to decide. See Pet. 21-22. Respondents endeavor to duck that critical question by simply labeling it, without response, explanation or citation, "unpreserved." Opp. 28. That is plainly wrong, for several reasons. First, it is well established that, "[o]nce a federal ***claim*** is properly presented, a party can make ***any argument*** in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) (emphasis added). It is indisputable that petitioners raised the claim that respondents' program of suspicionless searches violated the Fourth Amendment's prohibition against unreasonable searches. As in *Yee*, having raised the claim that the City's policy violated a particular clause of the Constitution, "petitioners could * * * formulate[] any argument they like[] in support of that claim here." *Id.* at 535; accord *Citizens United* v. *Fed. Election Comm'n*, 130 S. Ct. 876, 893 (2010).

As it happens, moreover, not only was the same ***claim*** indisputably raised below, so too was the virtually identical ***argument***. In the court of appeals, invoking *Ferguson*, petitioners repeatedly and emphatically argued that "excessive entanglement" of law enforcement and the possible use of positive test results in criminal prosecutions preclude application of the "special needs" doctrine to IO-52's program of suspicionless searches and renders the searches unconstitutional under the Fourth Amendment. See, *e.g.*, Brief for Appellants 28-38. Petitioners make that same argument, and present that same question, here. See Pet. *i*, 11, 15-17, 22. The only difference is that, having now received the court of appeals' decision that, notwithstanding that one purpose of IO-52 is "directly related to crime control," the special needs doctrine cannot apply because the

crime control purpose purportedly is not "primary" (Pet. App. 12a-13a), petitioners now add that the same argument obtains regardless which purpose might be deemed "primary."

Finally, even were these two grounds of preservation unavailable, the issue whether significant, but not primary, law-enforcement purpose and entanglement renders a program of suspicionless searches unconstitutional would still be preserved for this Court's review because that precise issue was decided by the court below. See, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). See Pet. App. 13a ("Here we must clarify one aspect of law surrounding the 'special needs' doctrine: * * * the mere fact that crime control is *one* purpose—but not the *primary* purpose—of a program of searches does not bar the application of the special needs doctrine.").

5. Respondents obliquely suggest that *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602 (1989), decided the question here, contending that *Skinner*, in upholding a private employer's post-accident suspicionless testing, reserved only the question whether the administrative nature of a suspicionless search program could be impugned by a showing of "pretext" and held that, absent pretext, the program must be assumed to be intended for "'its obvious administrative purpose.'" Opp. 24-25 (quoting *Skinner*, 489 U.S. at 621 n.5). That is incorrect. The Court in *Skinner* explicitly "[left] for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, ***or otherwise*** impugn the administrative nature of the * * * program." *Skinner*, 489 U.S. at

621 n.5 (emphasis added). That statement expressly reserved the question whether the "administrative nature" of a suspicionless search program might be "impugned" not just by a showing of "pretext," but "otherwise," such as by mixed motives or excessive entanglement of law enforcement—both of which are present here. Were that not so, the Court would have needed to renounce, rather than invoke, *Skinner* to decide *Ferguson*, which was itself a mixed motives case—with an immediate law-enforcement objective and an ultimate civil objective—in which there was no possible claim that the civil objective was "pretext."

Moreover, respondents ignore that the Court explained in *Skinner* that it "recognized exceptions to" the usual Fourth Amendment requirements only "when 'special' needs * * * make the warrant and probable-cause requirement ***impracticable***." 489 U.S. at 619 (emphasis added). In *Skinner*, what made the requirements impracticable was the fact that the searches were conducted not by law-enforcement officials like respondents, but by private "[r]ailroad supervisors" who "are not in the business of investigating violations of the criminal laws." *Id.* at 623. Obviously, respondents can make no such claim of "impracticability." The law-enforcement officials who respond to every shooting are specially trained to assess whether constitutionally sufficient grounds for suspecting intoxication exist and warrant a breath test. See Pet. 5-6. Cf. *McDuff* v. *Mississippi*, 763 So. 2d 850, 855 (Miss. 2000) (en banc).[1]

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[1] Because IO-52 requires ***neither*** reasonable suspicion ***nor*** probable cause, it is necessary to address in this case only whether some level of individualized suspicion, not which level,

Respondents resort to invoking *New York* v. *Burger*, 482 U.S. 691 (1987), in support of their proposition that the special needs doctrine can exempt suspicionless searches "where, as here, there may be an incidental law enforcement purpose." Opp. 27-28. But as the Court explained in *Ferguson*, "this case differs from *New York* v. *Burger*" in that *Burger* involved a search of "commercial premises," not a more intrusive bodily search. 532 U.S. at 83 n.21.

6. Respondents' effort to dispute that state supreme courts have divided over the scope of the "special needs" doctrine in cases squarely analogous to the one at bar, with the vast majority holding programs similar to IO-52 unconstitutional (Opp. 28-29), falls flat. Exactly like this case, these decisions addressed statutes that mandated suspicionless substance testing as part of police investigations into public safety incidents and the possibly criminal conduct of the tested individuals of causing the injury or death of another person due to intoxication. Most of the state courts addressing such statutes ruled them unconstitutional despite recognizing that they served multiple important civil purposes, including (exactly as IO-52 is claimed to do): deterring dangerous conduct while intoxicated and identifying and immediately removing people who have engaged in such conduct to prevent an imminent threat to public safety. See Pet. 23-27.

Respondents err in suggesting that these cases are "inapposite" because the drivers are not "employees who, like the officers here, have a diminished expectation of privacy." Opp. 28-29. The expectation

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is required as a predicate to the police investigators' post-incident breath-testing.

of privacy, or lack thereof, comes into play only in the balancing test of the individual's and government's interests that follows ***if*** the "special needs" doctrine applies. See, *e.g.*, *Von Raab*, 489 U.S. at 665-666 (assessing first whether the "drug-testing program [was] * * * designed to serve the ordinary needs of law enforcement" as a predicate to assessing the "balance of privacy and governmental interests"). The question at issue here, by contrast, is whether the special needs doctrine applies in the first instance.

Respondents attempt to distinguish the Ninth and Fifth Circuit decisions that applied *Ferguson* to hold unconstitutional searches that, like IO-52, are conducted for mixed law-enforcement and civil purposes absent individualized grounds for suspicion, arguing that those cases did not involve "exigent circumstances." Opp. 29. But no one disputes that the exigent circumstance of the possible rapid dissipation of evidence of intoxication may justify a search without a warrant. What that prospect does not justify is a search without ***any ground for suspicion***. Cf. *Schmerber* v. *California*, 384 U.S. 757 (1966).

7. Respondents boast that new, non-record evidence indicates that "as of August 8, 2010, there have been 133 breathalyzer tests pursuant to IO 52" (Opp. 26 n.4) and "not a single officer has been found to have been impaired" (Opp. 28). But it is no virtue that the people searched pursuant to a suspicionless search policy have been guilty of no wrongdoing. Respondents' suggestion that this evidence proves the testing's deterrent effect (*ibid.*) is misguided. To the contrary, the failure of the suspicionless testing to identify any intoxication by officers who have discharged their weapons merely confirms what the

dearth of evidence of such wrongdoing prior to adoption of the suspicionless testing program suggested: an absence of a "concrete danger" warranting the suspicionless testing in the first place. *Chandler* v. *Miller*, 520 U.S. 305, 318-319 (1997); see also Pet. 7, 32.

8. Respondents' unsupported declaration that the court of appeals' ruling is "fact-specific" and its reach therefore limited (Opp. 29) is simply wrong. The court of appeals ruled that the "special needs" doctrine allows police to conduct suspicionless, nonconsensual substance tests of employees whose conduct affects public safety, notwithstanding that the searches are intended to uncover evidence for use against the employees in possible criminal prosecutions, provided the searches are conducted "primarily" to deter employee intoxication in dangerous circumstances, identify and immediately remove intoxicated employees whose continued work may pose a threat to public safety, and/or uphold the safety reputation of the institution. Respondents do not and cannot identify a single reason why that holding would not apply equally to search policies affecting not only every law-enforcement and correction officer, but also every employee in every industry and governmental function, whose conduct can significantly affect public safety.

Indeed, the reach of the court of appeals' holding that the "special needs" doctrine can apply notwithstanding significant law-enforcement entanglement and purpose is even broader. That holding would enable ***every*** private or government entity, whose primary purposes for their existing drug-testing programs are civil, to add to those programs a new feature: mandatory reporting of all positive test results

to law-enforcement for criminal prosecution. See Pet. 30-32. All they need do, under the Second Circuit decision, is postulate that referral to law-enforcement will enhance deterrence, thereby better accomplishing their ultimate civil objectives.

9. Finally, respondents suggest that the Court decline to grant review because the case arises from preliminary injunction proceedings. Notably, however, they do not actually assert that the preliminary injunction record is in any way incomplete or inadequate to allow a final ruling on the constitutionality of the City's search program. See Opp. 19-22. Nor could they make such an assertion, given their own counsel's repeated concessions to the contrary before the court of appeals. Specifically, respondents conceded that the evidentiary record on the constitutionality of IO-52 is "certainly as complete as it's probably gonna get." Pet. 10 n.2; Pet. App. 49a. They likewise agreed that the court of appeals was "in a position on the basis of this record" to rule on the constitutionality of IO-52 and that there "absolutely" was "enough of an evidentiary record to support that legal determination." Pet. App. 47a.

Constrained by those concessions, respondents hinge their argument not on an assertion that the record actually is insufficient to support a final determination, but on their observation that petitioners, who likewise asserted before the court of appeals that the record appeared sufficient for a final determination (Pet. 10-11), once took a different position at an earlier stage of the litigation by opposing summary judgment. Opp. 19-20.

But that is irrelevant. The court of appeals has now rendered a decision. Notably, that decision on the constitutionality of IO-52 does not rest on any

basis peculiar to the preliminary injunction context, such as a balancing of equities or assessment of a "likelihood" (as opposed to a certainty) of success on the merits. Indeed, one of the court of appeals judges observed at the oral argument that were the court to do as it has now done—that is, affirm the denial of the preliminary injunction—petitioners' case would effectively, if not actually, be "over." Pet. App. 48a. Accordingly, as in *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), review by the Court at this time is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

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